1879

Bradley

Field

Submitted Jan 20 1880

12-64

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 788.

THE UNITED STATES, APPELLANT,

vs.

CAMPBELL K. PECK.

affirmed.

AND

No. 789.

CAMPBELL K. PECK, APPELLANT,

vs.

THE UNITED STATES.

Reversed

APPEALS FROM THE COURT OF CLAIMS.

FILED JULY 15, 1879.

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1 I. *Petition.—Filed November 7th, 1877.—J. R., ass't clerk.*

UNITED STATES OF AMERICA:

Court of Claims.

CAMPBELL K. PECK
against
THE UNITED STATES. } No. 11832.

1st. Campbell K. Peck, respectfully complaining, shows to this honorable court and states that he is a citizen of the United States, and a resident of Keokuk, in the State of Iowa.

2d. That heretofore, on or about the 17th day of August, A. D. 1876, Major Benjamin C. Card, quartermaster in the Army of the United States, and chief quartermaster of the Department of Dakota, then being such officer in the service of the United States of America, and acting for and on behalf of the United States, did make and enter
2 into a contract, in writing, to and with your petitioner, Campbell K. Peck, in the words and figures following, viz:

Articles of agreement entered into this seventeenth (17) day of August, in the year of our Lord one thousand eight hundred and seventy-six (1876), between Major Benjamin C. Card, quartermaster U. S. Army, chief quartermaster of the Department of Dakota, an officer in the service of the United States of America, and his successors in office, for and on behalf of the United States of America, of the first part, and Campbell K. Peck, doing business under the firm name of Durfee & Peck, of Leavenworth, county of Leavenworth, in the State of Kansas, of the second part.

This agreement witnesseth, that the said Major Benjamin C. Card, quartermaster U. S. A., for and on behalf of the United States of America, and the said Campbell K. Peck, for himself, his heirs, executors, administrators and assigns, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

I. That the said Campbell K. Peck, his heirs, assigns, administrators, and executors, shall supply, or cause to be supplied and delivered to the Quartermaster's Department at the military station of, at, or near the mouth of Tongue River, Montana Territory, eight hundred (800) tons of good merchantable hay, the delivery of which shall commence on or before the first day of October, 1876, and be completed on or before the thirty-first day of January, 1877, and the deliveries shall be at the rate of two hundred tons per month, or more, until the whole quantity shall have been delivered. Also, (6,000) six thousand cords of good
3 soft wood, or such other greater quantity of wood as may be required from time to time for the wants of said station during the fiscal year commencing July 1st, 1876, and ending June 30th, 1877.

II. That the said Campbell K. Peck shall furnish and deliver at said station, the aforesaid wood and hay between the first of July, 1876, and the 30th of June, 1877, in such quantities and at such time as the receiving officer may require, as set forth in Article I of this agreement.

III. That the said wood and hay, when delivered, shall be subject to inspection on behalf of the United States, as provided for by General Orders No. 87, dated headquarters Department of Dakota, October 31st, 1873.

IV. That, in case of failure on the part of the said Campbell K. Peck, his agents, heirs and assigns, party of the second part, to deliver any part of the supplies as stipulated by this contract, then the party of the first part shall have power to supply the deficiency, by purchase or otherwise, and the said party of the second part shall pay the difference in cost, and any money due said party of the second part may be used and applied to such payment.

V. That payment shall be made in the customary manner, upon the delivery of the supplies, as stipulated in Article I of this agreement, provided the voucher is complete, reciting that the hay and wood has been inspected as required, and provided that the contractor is not indebted to the United States under Article IV of this agreement, in the funds furnished by the government for public disbursement, and in the event of the contracting officer being without funds when payment is due, then payment shall be made as soon thereafter as funds shall be received by him for that purpose.

4 VI. That the said Campbell K Peck, party of the second part, shall receive the sum of thirty-four dollars and seventy-five cents (34.75), for each and every ton of two thousand pounds of hay, and eight dollars and sixty-five cents (8.65) for each and every cord of wood delivered and accepted, as stipulated in Articles I and III of this agreement, and that at any time when two hundred (200) tons of hay, and one thousand (1,000) cords of wood shall have been delivered, inspected, and received, a voucher may be made up and payment made thereon for one hundred tons of hay and five hundred cords of wood of the same, and thereafter for the quantity of hay and wood as delivered, until the last delivery under this agreement, when the one hundred tons of hay and five hundred cords of wood reserved shall be paid for.

VII. It is expressly understood that authority is granted to the party of the second part to cut, for the purpose of executing this agreement, upon any part of the military reservation at the aforesaid station, outside of a circle of one-half a mile from the adjutant's office of that said post.

VIII. That the said party of the second part shall be entitled to military protection in the execution of this contract or agreement, whenever, from the hostilities of the Indians, it may be deemed necessary by the post commander, whose duty it shall be to furnish protection to the extent of his power; this stipulation to give no foundation for any claim against the government for damages from Indians, or for any detriment arising from their depredations or hostilities.

IX. It is expressly understood that this contract or agreement
5 shall not be so construed as to involve the government in any obligation for the future payment of money in excess of the appropriations for the fiscal year ending June 30th, 1877.

X. It is further stipulated and agreed between the parties to this contract that, upon mutual agreement, it may be changed, altered, modified, or abrogated, in whole or in part; but no such change, alteration, modification or abrogation shall be interpreted as entitling the party of the second part to an increased rate or compensation over the rate or compensation specified in Article VI of this agreement.

XI. That no member of Congress, no officer or agent of the government, nor any person employed in the public service, shall be admitted to any share in this contract or agreement, or to any benefit which may arise therefrom.

XII. That this contract or agreement is made subject to the approval

of the commanding general of the Department of Dakota and of the Military Division of the Missouri.

In witness whereof, the undersigned have hereunto placed their hands and seals the day and date first above written.

(S'g'd) BENJ. C. CARD, [SEAL.]
Quartermaster U. S. A.

(S'g'd) CAMPBELL K. PECK. [SEAL.]

In presence of—
(S'g'd) I. B. LOYD.
(S'g'd) A. M. PETTIT.

Which contract was duly approved by the commanding generals of the Department of Dakota and of the Military Division of Missouri.

6 3rd. And your petitioner avers that no other or greater quantity of wood than six thousand cords of wood was required for the wants of said station during the fiscal year commencing July 1st, 1876, and ending June 30th, 1877, and avers that he supplied and caused to be supplied and delivered to the Quartermaster's Department of the United States Army, during the fiscal year aforesaid, at the places aforesaid, four thousand five hundred cords of wood of the quality described and specified in said contract, and fifteen hundred cords of dry wood of superior quality to that specified in said contract, from time to time during said year, for the wants of said station, making six thousand cords of wood, as provided in said contract.

4th. And your petitioner avers that he did not furnish said eight hundred tons of hay as provided by the terms of said contract, and caused to be furnished forty-six tons of said hay (and twelve tons which was paid for at the rate of fifty dollars per ton), which has been paid for at said contract price by the defendant. And your petitioner avers that he was prevented from furnishing said hay and fully performing said contract according to its terms by the defendant, as more fully appears by the following allegations:

That when said contract was made, it was specially understood and agreed by and between your petitioner and said Benjamin C. Card, chief quartermaster of the Department of Dakota, and major United States Army, that said hay in said contract provided to be furnished, could be cut on the meadows at and near the mouth of the Yellowstone River, and be transported to the cantonment on Tongue River by

7 steamboats, and that the same could not be cut nor furnished from any other point, And your petitioner avers that said hay could not be cut nor furnished from any other point than said meadows near the mouth of the Yellowstone River, as the defendant, by all its officers and agents in the military department of Dakota, then and there well knew. And your petitioner avers that said meadows near the mouth of the Yellowstone River were on the public lands and near the military reservation of Fort Buford, and wholly under the control of the military authorities of the United States.

And your petitioner avers that, immediately after the execution of said contract with the United States, as aforesaid, which was not done on the day of the date of the same, but on or about the twenty-seventh day of August, A. D. 1876; and on the twenty-ninth day of August, 1876, he procured mowers, horses, hay presses, with teams, and boats, and employees, and all other material necessary to secure said hay without delay, and sent them forward forthwith to said meadows, and to the only place and point where said hay could be procured under said contract; and that, upon the arrival of said teams, men and material,

to cut and secure said hay, and on or about the tenth day of September, A. D. 1876, the defendant, by and through the proper military authorities of the United States, prevented and prohibited the cutting of said hay on said meadows by your petitioner, and ordered, and directed, and provided that the same should be cut by the firm of Leighton & Jordon, sutlers at said Fort Buford, for the same cantonment and the use of the same troops as that provided for in and by the contract with your petitioner. And your petitioner avers that the whole amount of grass
8 that could be cut and made into hay on said meadows, or anywhere on the Yellowstone River, did not exceed eight hundred tons, all which said military authorities had directed and provided to be cut by said Leighton & Jordan, as aforesaid, immediately after said contract was made and entered into by your petitioner, and for that purpose had given to said Leighton & Jordan permission to cut the same, and all of the same.

5th. And your petitioner avers that immediately upon ascertaining that he would not be permitted to cut hay on said meadows, as contemplated by said contract, he demanded of the commanding officer of Fort Buford an escort to protect his men and property in making search for hay at other points, and in protecting said men and property while procuring the same, and that said escort was then and there deemed necessary by said post commander, but all protection was then and there refused, and said men and teams proceeded towards the cantonment on Tongue River without escort, and on or about the 18th day of September, 1876, were attacked by hostile Indians, and twelve head of his working animals were killed or run away, and his employees were unable to proceed in the execution of said hay contract; and avers that no escort or protection was ever furnished him during the time that he was to furnish said hay, as provided in said contract, and that without escort and protection it was impossible to furnish the hay provided for therein.

6th. And your petitioner further avers, that when said contract was made as aforesaid it was expressly understood and agreed that said hay could and should be transported from the mouth of Yellow-
9 stone River, where it was to be cut, to the cantonment on Tongue River, where it was to be delivered by boats or transports on said river, which the officers and agents of the defendant represented and stated was navigable for that purpose. And your petitioner avers that he had no personal knowledge of the condition of said river, and entered into said contract to furnish said hay, relying upon said representations and reports of said officers and agents of the defendant. And your petitioner avers that said representations and statements were false and untrue, and that said Yellowstone River was not navigable, nor any part thereof, for any purpose after the date of said contract until May, A. D. 1877, and that no portion of said hay could have been transported up the same after the date of said contract, and could have been transported only by land. And your petitioner further alleges, that there was no grass nor hay within one hundred and fifty miles of said cantonment on Tongue River, and no grass nor hay at any point to fill said contract, except at said meadows near the mouth of the Yellowstone as aforesaid.

7th. Your petitioner further avers that said six thousand cords of wood was inspected, measured, and received by the proper officers of the United States, as provided by General Orders No. 87, headquarters department of Dakota, October 31st, 1873, as provided in said contract, and that the failure to furnish said hay by your petitioner was the result of the failure of the United States to stand to and abide by the

terms of said contract on its part, as aforesaid, and that no deficiency or cost of said hay can lawfully be charged as an offset against his claim for wood under said contract. And your petitioner avers that payment has not been made to him in the customary manner, upon the de-
10 livery of supplies, as stipulated in article one of said agreement, and that, although the voucher delivered to him for said six thousand cords of wood was complete, reciting that said wood had been inspected as required, as more fully appears by said voucher, which is hereto attached and marked Exhibit A and made a part of this petition, whereby the United States became indebted to your petitioner in the sum of fifty-one thousand and nine hundred dollars, and although said contracting officer had funds to pay the same, still your petitioner was allowed and paid thereon the sum of ten thousand nine hundred and nineteen $\frac{37}{100}$ dollars, and no more; and avers that the United States failed and refused to pay your petitioner the balance of forty thousand nine hundred and eighty $\frac{63}{100}$ dollars due him for said wood, for the reason that they claimed that he was indebted to the United States in that sum under the fourth article of said agreement; whereas, in truth and fact, he was not indebted to the United States in that sum, nor any other sum, under said article in said agreement, or otherwise. And your petitioner alleges that said hay specified in said Exhibit A, as provided by the government to supply deficiencies in said contract as provided in Article IV, did not cost and was not of the value of forty-nine thousand thirty-nine dollars and sixty-seven cents ($49,039.67), and did not necessarily cost to secure and transport the same more than ten thousand ($10,000) dollars, and was not worth or of any value whatever, and after the delivery of the same was wasted and destroyed, and not consumed or used by the United States.

8th. Your petitioner further avers that, upon the refusal of the
11 chief quartermaster of the department of Dakota pay to him the said contract price for said six thousand cords of wood, or any part thereof, he submitted his claim for the same, to wit, for fifty-one thousand and nine hundred dollars, to the honorable Secretary of War, who, on the 20th day of September, A. D. 1877, made an order and decision thereon, which decision and the letter advising your petitioner of the same, is hereto attached and marked Exhibit B, and made part of this petition.

9th. Your petitioner further avers, that thereafterwards, and on the 8th day of October, A. D. 1877, he presented his said claim, with a copy of said letter from the honorable Secretary of War, to the chief quartermaster department of Dakota, for the payment therein ordered, and was paid by said chief quartermaster the sum of ten thousand nine hundred and nineteen $\frac{37}{100}$ dollars, as therein directed, and that vouchers and statements were thereupon signed by him and by the chief quartermaster making said payment, which account, receipt, and statement, signed by the respective parties, is hereto attached and marked Exhibit A, and made part of this petition as aforesaid.

10th. And your petitioner avers that he has been paid no other or larger sum than said ten thousand nine hundred and nineteen 37-100 dollars on account of said wood, and that the United States remain indebted to him for said wood, delivered under said contract, in the sum of forty thousand nine hundred and eighty dollars and sixty-three cents.

11th. And for a further and other cause of action, your petitioner further avers that, on or about the first day of October, A. D. 1876, he was ordered and directed by the commanding officer of the United

EXHIBIT A, (referred to in petition.)

Form No. 9. Voucher to Abstract A.

The United States to Campbell K. Peck, Dr.

Place and date of purchase: Cantonment, Tongue River, M. T.

For the following supplies, delivered at military station, mouth of Tongue River, M. T., under a contract of August 17, 1876, with Major B. C. Card, chief q'r m'r dept. of Dakota, for supplying and delivering at said station 800 tons of hay and 6,000 cords of wood, as per vouchers attached, and report filed herewith, viz:

1876.			
September	30,	300 cords wood.	Total, 6,000 cords, @ $8.65 per cord. $51,900.00.
November	25,	2,108 cords wood.	
December	31,	342½ cords wood.	
1877.			
June	30,	3,249½ cords wood.	

17 The contractor having failed to comply with the stipulations of his contract in supplying the hay as provided for, the government was compelled to supply the deficiency by purchase and otherwise, as provided for in article 4 of the aforesaid contract, at the following cost, viz:

91,621 lbs. hay purchased by A. A. Q. M., at Tongue River, @ $34.75 per ton	$1,591 91
23,212 lbs. hay purchased by A. A. Q. M., at Tongue River, @ $50.00 per ton	580 31
348,997 lbs. hay from Fort Buford, cost, including original price of hay, cost of baling and transportation, &c., see report herewith	46,867 45
	49,039 67
Deduct contract price of said hay, @ $34.75	8,059 04
Difference in cost chargeable to contractor, as per article 4 of this contract	40,980 63
	$10,919 37

I certify that the above account is correct and just, and that the articles have been accounted for on the property returns for the
18 quarters ending on the 30th of Sept. and 31st of Dec., 1876, and 30th of June, 1877, of Lieut. E. W. Randall, 5 Inf'y., A. A. Q. M., as shown by vouchers herewith.

(S'g'd) BENJ. C. CARD,
Quartermaster.

Received at St. Paul, Minn., the 8 of October, 1877, of Major B. C. Card, quartermaster U. S. Army, the sum of ten thousand nine hundred and nineteen (10,919) dollars and thirty-seven (37) cents, in full of the above account as the sum found due and allowed by the War Department.

(Signed in duplicate.) (S'g'd) CAMPBELL K. PECK.

The within receipt for $10,919.37 is made as the sum found due and allowed by the War Department, and is not a receipt in full of all demands under the contract referred to within, and is not to be considered as in any wise as preventing the claimant from bringing suit for an alleged balance due under said contract, or to prejudice his claim for such balance in court.

St. Paul, Minn., Oct. 8th, 1877.

(S'g'd) CAMPBELL K. PECK.
(S'g'd) BENJ. C. CARD,
Quartermaster.

19 Form No. 9. Voucher No. 2. Abstract A.

OCTOBER, 1877.

Campbell K. Peck:

Dollars 10,919 37-100

Paid 8th October, 1877.
Check No. 19517.
Date, Oct. 8, 1877.
Amount, $10,919 37-100.
Depository, Chicago, Ill.

EXHIBIT B (referred to in petition).

WAR DEPARTMENT,
Washington City, September 20th, 1877.

SIR: Referring to your claim to be released from certain obligations growing out of a contract with the United States for furnishing and delivering hay and wood at the military post near Tongue River, Montana Territory, I have the honor to inform you that Major Card, quartermaster United States Army, having submitted a report in connection with and supplementary to report submitted by him on the 30th
20 of June last, and said report having received the approval of the quartermaster-general, the following order has been made thereon this day:

"Respectfully returned to the Quartermaster-General of the Army. The claimant will now be paid the sum of $10,919.37, as recommended by the within report. This department can allow no greater sum, but in order that claimant may bring suit for an alleged balance, he will be required to receipt for the above amount as the sum found due and allowed by the War Department, and will not be required to execute a receipt in full of all demands under his contract."

Application for payment of the amount found due by the department should be made to Major Card, chief quartermaster Department of Dakota, at Saint Paul, Minnesota.

Very respectfully, your obedient servant,

GEO. W. MCCRARY,
Secretary of War.

Colonel C. K. PECK,
Keokuk, Iowa.

21 II. *Traverse.—Filed November* 8, 1877.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every

allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Asst. Att'y General.

22 III. *Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court upon the evidence finds the facts to be as follows:

I.

Whenever a month is named in these findings the year 1876 is intended unless otherwise specially stated.

Fort Buford is situated in latitude 48° north, on the north bank of the Missouri, nearly opposite the mouth of the Yellowstone, in the center of a reservation of 30 miles square, and in the ordinary route from Tongue River cantonment to the east.

Bismarck, the nearest settlement, is situated on the Missouri where the Northern Pacific Railroad crosses that river, about 225 miles below Fort Buford by land, and about 380 miles by the river.

Tongue River joins the Yellowstone on its southern bank, 172 miles above the junction at Fort Buford. The nearest settlement to Tongue River Junction is Bozeman, in Montana, 300 or 400 miles distant. With the exception of the miners in the Black Hills, the section of country between Bozeman and Bismarck was, in 1876, occupied only by the military and by bands of hostile Indians.

Powder River enters the Yellowstone on its southern bank about 40 miles below the Tongue River Junction. About 60 miles below Powder River Junction is Glendive, on the north side of the Yellowstone. From Fort Buford to Glendive the distance is 70 miles.

In the autumn of 1876 the Missouri was navigable between Bismarck and Buford. In the Yellowstone there are rapids known as Wolf's Rapids, 5 miles below Powder River Junction, and other rapids known as Buffalo Rapids, between Powder River Junction and Tongue River Junction. In ordinary years the Yellowstone is navigable as far as Tongue River between May and August, and is relied upon to supply the posts on that river. The year 1876 was a year of unusual rains, and boats in that year went above Tongue River Junction; but the river was not navigable above Powder River after September 1, nor above Glendive after September 20. After September 25 no boat could get to Glendive. From that time throughout the year freight was sent up the Yellowstone from Fort Buford by wagon transportation.

II.

In the year 1876 a state of war existed throughout that region. The massacre of General Custer's troops took place about 125 miles from Tongue River post. After that fight Sitting Bull crossed the Yellow-

stone with part of his force at the mouth of Powder River, and the rest crossed at or near Glendive.

23 General Sheridan thereupon ordered the establishment of a cantonment to accommodate a regiment of cavalry and a force of infantry at or near Tongue River, and directed supplies for the winter to be taken there. A post was also established the same summer at Glendive. General Card was at that time chief quartermaster of the department, with headquarters at Saint Paul, in Minnesota.

The Yellowstone Valley had been the usual winter home of the Sioux Indians; but its occupation by United States troops prevented them from wintering there in 1876–'77. They had no winter home that season, and kept constantly moving about. Ordinary supply-trains going from Buford to Tongue River without an escort were exposed to great danger, although parties did come through without molestation.

In August of that year Colonel Forsyth, of General Sheridan's staff, reported that no hay could be procured on the Yellowstone except near the mouth. On the "Big Meadows," on Fort Buford Reservation, about 12 miles from the fort, there was grass growing suitable for making about 1,000 tons of hay. This was the tract referred to by Colonel Forsyth.

On the 9th of August General Card telegraphed to the quartermaster at Fort Buford, "Have hay cut for Tongue River. Will want large quantity. How much can you secure? Will send baling-press. How much can commissary get in addition to his contract?"

General Card invited several contractors, among whom was the claimant, to make proposals for supplying hay and wood at Tongue River cantonment. The claimant, who was then a resident of Keokuk, Iowa, made proposals for that purpose, which were accepted by telegraph on the 22d August.

On the same 22d August the regimental quartermaster at Fort Buford wrote to General Card that he could procure about 200 tons of hay for Tongue River; and on the 24th August he telegraphed him to send two baling-machines and rope enough to bale 400 tons of hay.

On the same 24th August General Card wrote from Saint Paul to the assistant quartermaster at Fort Buford, through General Hazen, the commanding officer at that post, that he had made a contract for hay with the claimant, and that it would not be necessary to provide hay for Tongue River at Buford, and that consequently he would not send up a hay-press.

III.

On the 26th or 27th of August the claimant, who had proceeded from Bismarck to Saint Paul for the purpose, had an interview with General Card, at which the contract for supplying hay and wood at Tongue River cantonment, dated August 17, 1876, was executed and interchanged in form as set forth in the claimant's petition.

At the same interview, General Card was informed that the claimant would at once send men and machines to "Big Meadows" to cut the hay known to be there, and would at once send on, to be forwarded by boat from Bismarck, hay-presses, tools, materials, and supplies. General Card replied that it was late in the season, and he hoped no time would be lost. The claimant answered that he had two boats of his own, and should procure others if necessary. The general offered to do all he could to assist the claimant; and also to direct the quartermasters at Fort Buford and Tongue River to aid him in filling the contract in every way they could consistently with their duty. The claimant said

that he had no personal knowledge of the condition of the Yellowstone; but from reports made by officers of the Army, he judged it to be as navigable as the Upper Missouri; in which case he would have
24 plenty of time to transport the hay by steamer. The only doubt was about Wolf's Rapids, and he should provide a boat above the rapids and a boat below, and transfer the hay at that point. General Card at that time supposed that the claimant would be able to ascend the Yellowstone as far as Glendive, but he made no reply to the claimant's said statement about steam navigation, and did not agree that the claimant should be able to transport the hay by water.

At the time when the said contract was entered into, the cost of cutting and curing and baling hay on the said "Big Meadows," and of delivering it at points on the river where steamboats could load, was $27 per ton of 2,000 pounds; rope and baling-machine being furnished by the United States; and the cost of transporting hay from Fort Buford to Tongue River cantonment by steamer, when the Yellowstone was navigable, was $30 per like ton.

IV.

The claimant immediately made preparations to perform his said contract. On the 29th August he sent forward from Bismarck to Fort Buford by land, teams loaded with supplies, machines, scythes, hay-forks, rakes, two mowing-machines, and all other tools necessary for cutting hay, together with foremen and gangs of men, who were instructed to go at once to the "Big Meadows" and commence cutting hay. A beater-press and a steam hay-press were also forwarded, with the necessary wire for baling hay.

On the 29th August, General Hazen, under the said telegraphic instruction of the 9th August, contracted with Leighton & Jordan to deliver 1,000 tons of hay, more or less, at points on the Yellowstone and Missouri Rivers not to exceed 30 miles from Fort Buford, said hay to be placed at points on said rivers where steamboats could load, properly stacked, for $19.50 per ton of 2,000 pounds; or to deliver said hay baled for $27 per ton.

General Hazen first learned of said contract with the claimant on the 4th September. He immediately notified Leighton & Jordan of the fact, and told them that they could go on cutting the grass at their own risk, and furnished them with a guard, consisting of a corporal and ten men, to protect them while doing it. Before the arrival of the claimant's agent at Fort Buford he informed General Card that in his opinion the claimant could not comply with his contract, and advised that the cutting should be continued under Leighton & Jordan.

The claimant's agent arrived at Fort Buford on the 6th September, and proceeded the same day by steamer to "Big Meadows." He found Leighton & Jordan's force cutting the hay there. They had run the machine round most or all the grass fit for hay, and had then made from 200 to 250 tons of hay. They were actively at work, and continued so until about the middle of October, and cut and cured in all nearly 800 tons.

General Hazen informed the claimant's agent that Leighton & Jordan were cutting the grass under his authority, in order to execute a contract for supplying Tongue River with hay which General Card had directed him to make. The agent replied that the claimant held a contract from General Card for furnishing hay to that cantonment, which had been taken with the understanding that they could either get hay on the

Yellowstone near the post, or cut it below on some point and ship it on boats; and that he expected to cut it from the "Big Meadows," where was the only hay known to him from which the contract could be filled.

General Hazen did not acquaint the claimant with the instructions which he had given to Leighton & Jordan and the recommendations which he had made to General Card on learning of the claimant's contract.

A portion of the claimant's train from Bismarck arrived at Fort Buford on the night of the 6th September. On the 7th September the claimant's agent told General Hazen that he was about to send that train up the Yellowstone, and that he wished it to make a thorough examination of all the country between Fort Buford and Tongue River, and to cut whatever hay could be found; but that the country was full of hostile Indians, and the men were unarmed and would not go without an escort; and he asked General Hazen to furnish an escort for the train. The general refused the escort, and said that he thought the claimant's contract could not be fulfilled. The agent then asked for arms for the men. General Hazen gave them ten guns. The agent immediately ferried the teams, men, and tools across the river, and on the afternoon of the 7th the train proceeded up the Yellowstone. At Glendive the claimant's agent demanded an escort of the commandant at that post. The commandant refused the request, but offered permission to accompany the government train to Tongue River, which would leave in about twelve days. The agent pushed on without escort, and arrived at Tongue River on the 23d September.

The agent made great efforts to find grass fit for hay. He searched throughout the valley of the Yellowstone and through the Tongue River country for 30 or 40 miles without finding any. While at Tongue River cantonment he asked the commandant for an escort to go with his men into the country around that post to find hay. The commandant refused to furnish it. The agent then returned to Fort Buford and informed General Hazen of the result, and said that he could proceed no further in executing the contract without a military escort.

On the 12th October General Hazen informed the assistant adjutant-general at Saint Paul, by letter, that the claimant's agent had returned with all his haying implements, and of the demand for a military escort, and further said that he was satisfied that the claimant did not intend to do anything with the hay.

V.

The claimant delivered no portion of the hay under his said contract. On or about the 21st October, General Card sent orders to General Hazen to supply the deficiency and to transport it by wagons, and to keep an account of the expense and report the same to department headquarters. This order was received by General Hazen on the 9th November.

A portion of the deficiency was purchased at Tongue River cantonment at the contract price. Eleven tons were also purchased at the same place, at the rate of $50 per ton. The rest of the deficiency was made up from the said hay cut and baled at "Big Meadows" by Leighton & Jordan, and amounted to 301,341 pounds delivered at Tongue River cantonment, costing at "Big Meadows" $27 per ton of 2,000 pounds.

The 301,341 pounds of hay so delivered at Tongue River were transported thither by directions of General Hazen. As soon as he received General Card's order of the 21st October, he set about constructing racks

for the transportation wagons at his post belonging to the government, and he also endeavored to hire private transportation. The hay was carried in several trains, the first of which left about the 17th November, and the last about the 20th December. The trains were mixed trains, each consisting of from 40 to 60 wagons, and transporting other government supplies as well as hay. About two-thirds of the hay was transported in hired wagons, and about one-third in government wagons.

The hired wagons were two-horse or mule wagons, each capable
26 of carrying 2,400 pounds of hay. The government wagons were six-mule wagons, each capable of carrying from 4,500 to 6,000 pounds.

It does not appear that an accurate account was kept of the time actually occupied in the transportation of the hay. The hay-wagons were mixed in the trains with wagons containing other supplies. All the wagons were billed at Fort Buford for Glendive only. At Glendive they were detained for making up new trains with government supplies for Tongue River, and were forwarded thither from Glendive under direction of the assistant quartermaster at the latter post. The round trip with a hay-train from Fort Buford to Tongue River cantonment and back might reasonably have been made in twenty days at any time between the 17th November, 1876, and the middle of January, 1877.

It is not shown that the defendants were put to any cost for the government wagons employed in transporting said hay which they would not have been put to had the wagons rested at Fort Buford. The defendants contend that they are entitled to compensation for the maintenance and support en route each day of each government six-mule team employed in such transportation at double the rate allowed to a private two-horse or mule team for a day's service in the same. If the defendants are entitled to any compensation for such maintenance and support they are entitled to it at the rate so contended for.

Two hundred thousand eight hundred and ninety-four pounds of said hay was delivered at Tongue River by hired teams. Each hired team cost the defendants $4.87\frac{1}{2}$ per day, and rations and forage. Each such team required en route forage to the amount of 560 pounds of hay and 400 pounds of oats and 22 rations. The hay so consumed cost the defendants at Fort Buford $7.56; the oats, $9.37; and the rations, $4.62.

It is not proved that the hay, oats, and rations so consumed en route were transported in private wagons. Had they been so transported the cost of the transportation of the amount of each kind necessary for each private team would have been: of the hay, $28.84; of the oats, $20.60; of the rations, $16.48.

VI.

The said Beater press, and the said steam hay-press, shipped as aforesaid by the claimant from Bismarck to Fort Buford, arrived at the latter place in good condition before the middle of September. Each was the property of the claimant. The claimant's agent, on their arrival, asked the regimental quartermaster at Fort Buford for permission to land them, and to have them protected. The quartermaster assented to the landing, and offered to protect them, and proposed to buy them for the purpose of using them in baling hay, if he could get authority to do so. He also proposed to hire them in case he could not get such authority. The claimant's agent accepted the proposition to buy them and refused the proposition to let them for hire, and left the machines in charge of the quartermaster in order that he might apply for authority to buy

them. The quartermaster used the machines, under the defendants' contract with Leighton & Jordan, in baling the hay cut under that contract, and left them exposed to the weather on the east bank of the Missouri, where they became dilapidated. The claimant demanded pay for the value of said machines; but the defendants refused to pay for more than the hire of the same. It does not appear that said machines have ever been returned to the claimant.

VII.

There was no military reservation at Tongue River cantonment when the said contract was signed; but 600 men were stationed there.
27 On the 11th September an order was issued for the reservation of an area of land 20 miles square, determined by a line drawn 10 miles north and south of the meridian through a point at the mouth of Tongue River, and 10 miles east and west of said meridian. The cutting of timber on the reservation was prohibited by said order.

The cantonment at Tongue River was situated about one-fourth of a mile south of the junction. All the wood within it, whether growing or dry, was cottonwood. On the Tongue River, near its mouth and below the junction on the Yellowstone, within the reservation, there was a large body of growing cottonwood. With this exception there was very little green wood on Tongue River within the cantonment. It was necessary to go five or six miles from the post to find much green wood on its banks.

There were also about 1,500 cords of dry cottonwood on the reservation. Some of this was timber that had been felled by Indians for the purpose of feeding their horses on the bark of the small limbs. These trees were scattered all through the other timber. A part of it was in one patch of about 25 acres that had been deadened by fire. The rest consisted of dry standing trees or of driftwood.

At that time 6,000 cords of green cottonwood might have been cut within a space of from half a mile to a mile and a quarter from the adjutant's quarters at said cantonment, and within from three-quarters of a mile to a mile from the quarters first established by the claimant, to be hereafter more particularly noticed.

Had the claimant been allowed to cut green soft wood tn such space he could have entirely fulfilled his agreements touching wood in said contract before January 10, 1877, and the necessary expense which he would have incurred at Tongue River in cutting and delivering the wood according to his contract would have been at the rate of $3.08⅓ per cord.

An agent of the claimant arrived at Tongue River with 9 teams and 32 men on the 19th September. He reported to the commandant, who directed him to cut some dry wood, and referred him to the quartermaster for the amount. The quartermaster said they would want 1,500 cords of dry wood. The agent replied that it would cost more per cord to furnish dry wood than green, and that, as he expected a person soon with more authority than himself, he would not take the responsibility of furnishing dry wood.

On the 23d September the foreman who was to superintend the cutting, and who was the person so referred to as having more authority, arrived with 3 more teams and 8 more men. He said that it would be a great deal more expensive to furnish dry wood than green, and he objected to doing it. The quartermaster insisted, however, that he should furnish 1,500 cords of dry wood.

The claimant's agent thereupon did furnish, as a part of the said 6,000 cords, 1,500 cords of dry wood between the 25th September and the 25th October. The necessary expense which he incurred at Tongue River in cutting and delivering at the cantonment the said 1,500 cords of dry wood was $5,540.

In order to provide against the inclemency of the season, the claimant's agent erected permanent quarters for his force about 800 yards from the post, and in sight of it, across Tongue River. The post was on the south side of that river, and the quarters were erected on the north side of it in the large body of growing cottonwood already referred to. There was a cook-house, a building for the men, a store room, and office, and about 10 small cabins. All were built of logs, chinked and daubed, with dirt roofs. The cost of these improvements was $840.

28 On or about the 30th September the claimant's agent was informed by Colonel Whistler, temporary commandant at the post in the absence of General Miles, that he would not be allowed to cut green timber within a space of 10 miles from the adjutant's office in the cantonment. He replied that the contract permitted the wood to be cut within a circle half a mile distant from the adjutant's office. The temporary commandant answered that the ten-mile order had been made by General Miles, and that he would not interfere with it.

On the 2d October the agent left Tongue River in order to see General Miles, who was then at Glendive. At the time of his leaving, the houses in the quarters were all built, roofed, and chinked, but were not wholly completed.

On or about the 20th October the foreman in charge of the claimant's work applied to the quartermaster to know where the wood was to be cut, and where he was to establish his winter quarters for cutting it. The quartermaster replied that he would not be permitted to cut down green timber within ten miles of the reservation.

General Miles returned to the post on or about the 4th November. On the day after his return he showed the claimant's foreman where he would be permitted to cut the balance of the wood necessary to fill the contract. It was from two and one-half to five miles distant from the post, and not in the direction of the said quarters.

Without fault on the part of the claimant or his agents, 17 teams in the claimant's employ were idle and unemployed for ten days between the time when they finished cutting and hauling the dry wood and the commencement of cutting green wood under said last-named direction of General Miles. The necessary expense to the claimant of said teams was $8 each per day, for the ten days.

In consequence of the said direction by General Miles respecting the places from whence the wood should be cut, the claimant was obliged to abandon the said quarters, and to construct new quarters about three miles distant from them. The old quarters, when abandoned, had no market value, and were valueless to the claimant. The new quarters were necessary. Being further removed from the station, they were constructed so as to afford protection against Indians. They were finished in November, and cost $1,300.

On the 19th December, General Miles, in writing, prohibited the claimant from cutting green timber within three miles from the mouth of Tongue River.

By reason of the delays to which he was subjected, and of the action of the defendants' agents in preventing him from cutting green soft wood on said reservation outside of a circle of one-half a mile from the adjutant's office of the said post, the claimant was, without fault on his own

part, prevented from performing his said contract, as he otherwise would, before the 10th January, 1877. Inclement weather and deep snow came on long before he could complete it. No work could be done after the 15th January, 1877, until spring. The claimant could not graze his stock, nor obtain forage or hay for it there, and was obliged to discharge 12 teams and 25 men that had been brought there at great expense, and to send them back to Bismarck. At the time when work was stopped in the winter 5,000 cords of wood had been cut, of which 2,750 had been delivered, and 2,250 had been accepted.

In the spring following other teams were hired to complete the contract. The last delivery was made on the 28th June, 1877.

In consequence of said orders the claimant was obliged to haul 3,300 cords of green wood a greater distance than he would have been obliged to haul the same had he been allowed to cut it outside of a circle
29 of one-half mile from said adjutant's post. The additional cost of such extra haul incurred at and near Tongue River Station was at the rate of $1.67\frac{2}{3}$ per cord.

VIII.

The defendants denied that they were bound to pay the claimant for any part of the 6,000 cords of wood so furnished more than the contract price of $8.65 per cord, amounting, in the aggregate, to $51,900. They claimed the right to apply towards the payment of said aggregate the sum of $40,980.63, which they said was the difference in cost between the contract price of said hay purchased to supply the deficiencies at Tongue River and the actual cost of the same. The Secretary of War ordered that the claimant should be paid the sum of $10,919.37 as the balance found due him by the quartermaster, but, in order that he might bring suit for the recovery of an alleged balance, that he should not be required to execute a receipt in full of all demands under the contract. Thereupon the claimant was paid the said sum of $10,919.37, and gave receipt therefor in the form prescribed by the Secretary.

IX.

If the defendants were not authorized to deduct from the contract price of the wood some part of the cost of the deficiency in the hay, there is still due and unpaid to the claimant on the contract for supplying the wood $40,930.63.

If the defendants are entitled to apply to the payment of the wood any part of the cost of supplying the deficiency in the hay, they are entitled to apply thereto $4,068.10, the cost of 301,341 pounds of hay at $27 per ton; and $167.75, the difference between the cost of 11 tons at $50 per ton and the same amount at $34.75 per ton; and $8,190, the cost of the hire of the private teams which transported the hay from Fort Buford to Tongue River—in all, $12,425.85.

If the defendants are entitled to apply to the payment of the wood the cost at Fort Buford of the forage and rations used and consumed by the said private teams while transporting the hay, the amount of the same was $1,810.20.

If the defendants are entitled to apply to the payment of the wood the cost at Fort Buford of the forage and rations used and consumed by the government teams while transporting the hay, the amount of the same was $905.10.

If the defendants are entitled to apply to the payment of the wood

the cost of the transportation of the forage and rations so used and consumed while transporting the hay, the cost of the transportation of the amount used and consumed by the private teams was $5,547.28, and of the amount used and consumed by the government teams was $2,773.64.

The claimant, by reason of the said suspension of the work in October and November, was obliged to keep his teams idle at an expense to him of $1,360.

The value of the said Beater press was $387, and the value of the said hay-press was $1,746.

If the claimant is entitled to recover by reason of the delivery of dry wood in the place of green wood, the excess of the cost of the 1,500 cords of dry wood so delivered was $915.

If the claimant is entitled to recover damages for the breach of the defendant in refusing permission to cut wood within one-half mile of the adjutant's post, the amount of such damage was $6,833.

The court, having considered the requests for findings of facts made by the claimant and by the defendants, respectively, finds the following facts upon the evidence, in addition to those already found in this case:

X.

(Allowed at the request of the claimant.)

There was no market-rate of transportation from Fort Buford to Tongue River Cantonment during the autumn and winter of 1876–'77, except so far as the following facts tend to establish one: In September, 1876, the defendants, on their own invitation, received proposals from contractors for such transportation, of which the following is an abstract. The firm of Durfee & Peck, named in the abstract, is a copartnership firm, of which the claimant is one of the members:

Abstract of proposals received by Major B. C. Card, quartermaster U. S. A., chief quartermaster Department of Dakota, under the advertisement from office chief quartermaster Department of Dakota, dated September 11th, 1876, inviting proposals for furnishing transportation by teams for military supplies, etc., between Fort Buford, D. T., and cantonment Tongue River, M. T.

No.	Name of bidder.	Post office address.		Oct., '76.	Nov., '76.	Dec., '76.	Jan'y, '77.	Feb'y, '77.	March, '77.	Remarks.
1	Tho's S. Rosser & F. G. Winston.	Minneapolis	Per 100 lbs. pr. 100 miles.	6 45	7 65	7 12½	7 12½	7 12½	8 00	
2	Wm. W. Nichols	St. Paul		2 19	2 19	2 19	2 19	2 19	2 19	Gov't to furnish rations & forage. Provided not less than 500 tons.
				2 94	2 94	2 94	2 94	2 94	2 94	He furnishing rations & forage.
3	John Bowen	Bismarck		3 20	3 40	3 50	3 50	3 50	3 50	
4	Durfee & Peck.			3 00	3 00	3 00	3 00	3 00	3 00	Gov't to furnish escort for protection.

31 *Abstract of proposals received by Major Benj. C. Card, quartermaster U. S. A., chief quartermaster Department of Dakota, under the advertisement from office chief quartermaster Department of Dakota, dated September 11th, 1876, inviting proposals for furnishing transportation by wagon for military supplies, &c., between Fort Buford, D. T., and cantonment Tongue River, M. T.*

No.	Name of bidder.	Post office address.	Rate per 100 pounds. 1876. October.	November.	December.	Per 100 miles. 1877. January.	February.	March.	Remarks.
1	Thos. S. Rosser & F. G. Winston.	Minneapolis, Minn	$6 45	$7 65	$7 12½	$7 12½	$7 12½	$8 00	
2	William W. Nichols	Saint Paul, Minn.	2 19	2 19	2 19	2 19	2 19	2 19	The gov't to furnish forage and rations and necessary protection.
			2 94	2 94	2 94	2 94	2 94	2 94	If he furnishes forage and rations or buys them from government. The bid is provided there is not less than 500 tons.
3	John Bowen	Bismarck, D. T.	3 20	3 40	3 50	3 50	3 50	3 50	
4	Durfee & Peck		3 00	3 00	3 00	3 00	3 90	3 00	Government to furnish escort for protection.

XI.

(Allowed partly on the request of the claimant, partly on the request of the defendants, and partly on the suggestion of the court.)

At the time of the signing of the said contract between General Card, chief quartermaster of the Department of Dakota, and the claimant, there was no grass in the valley of the Yellowstone suitable for making hay except on the said tract at Big Meadows and on some smaller tracts, which were subsequently cut for delivery at Tongue River, and charged against the claimant by the Quartermaster General. All the rest had been destroyed by the Indians. These facts had been reported to General Card officially, and were known by him when he made the said contract with the claimant. There was some upland prairie on the Missouri, above the mouth of the Yellowstone, but this was thinner than the meadow grass, and was, in fact, taken possession of and cut by Leighton and Jordan in October.

At the time when the said contract was signed, both the claimant and General Card supposed that there was no grass on the Yellowstone, except that at Big Meadows, and it was then intended by both that the said contract should be executed by cutting the grass on the Big Meadows which was afterward cut by Leighton & Jordan under authority derived from General Card. This was the only grass on or near the Yellowstone from which, after the arrival of the claimant's teams at Fort Buford, it was practicable to make hay; and the only grass in that section from which it was practicable to make it in time to have the deliveries commence at Tongue River on the 1st day of October, the day named in the contract for the commencement of the deliveries.

the cost of the transportation of the forage and rations so used and consumed while transporting the hay, the cost of the transportation of the amount used and consumed by the private teams was $5,547.28, and of the amount used and consumed by the government teams was $2,773.64.

The claimant, by reason of the said suspension of the work in October and November, was obliged to keep his teams idle at an expense to him of $1,360.

The value of the said Beater press was $387, and the value of the said hay-press was $1,746.

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If the claimant is entitled to recover damages for the breach of the defendant in refusing permission to cut wood within one-half mile of the adjutant's post, the amount of such damage was $6,833.

30 The court, having considered the requests for findings of facts made by the claimant and by the defendants, respectively, finds the following facts upon the evidence, in addition to those already found in this case:

X.

(Allowed at the request of the claimant.)

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No.	Name of bidder.	Post office address.		Oct., '76.	Nov., '76.	Dec., '76.	Jan'y, '77.	Feb'y, '77.	March, '77.	Remarks.
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2	Wm. W. Nichols	St. Paul		2 19	2 19	2 19	2 19	2 19	2 19	Gov't to furnish rations & forage. Provided not less than 500 tons.
				2 94	2 94	2 94	2 94	2 94	2 94	He furnishing rations & forage.
3	John Bowen	Bismarck		3 20	3 40	3 50	3 50	3 50	3 50	
4	Durfee & Peck.			3 00	3 00	3 00	3 00	3 00	3 00	Gov't to furnish escort for protection.

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No.	Name of bidder.	Post office address.	Rate per 100 pounds. 1876. October.	November.	December.	Per 100 miles. 1877. January.	February.	March.	Remarks.
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2	William W. Nichols	Saint Paul, Minn.	2 94	2 94	2 94	2 94	2 94	2 94	If he furnishes forage and rations or buys them from government. The bid is provided there is not less than 500 tons.
3	John Bowen	Bismarck, D. T.	3 20	3 40	3 50	3 50	3 50	3 50	
4	Durfee & Peck		3 00	3 00	3 00	3 00	3 90	3 00	Government to furnish escort for protection.

XI.

(Allowed partly on the request of the claimant, partly on the request of the defendants, and partly on the suggestion of the court.)

At the time of the signing of the said contract between General Card, chief quartermaster of the Department of Dakota, and the claimant, there was no grass in the valley of the Yellowstone suitable for making hay except on the said tract at Big Meadows and on some smaller tracts, which were subsequently cut for delivery at Tongue River, and charged against the claimant by the Quartermaster-General. All the rest had been destroyed by the Indians. These facts had been reported to General Card officially, and were known by him when he made the said contract with the claimant. There was some upland prairie on the Missouri, above the mouth of the Yellowstone, but this was thinner than the meadow grass, and was, in fact, taken possession of and cut by Leighton and Jordan in October.

At the time when the said contract was signed, both the claimant and General Card supposed that there was no grass on the Yellowstone, except that at Big Meadows, and it was then intended by both that the said contract should be executed by cutting the grass on the Big Meadows which was afterward cut by Leighton & Jordan under authority derived from General Card. This was the only grass on or near the Yellowstone from which, after the arrival of the claimant's teams at Fort Buford, it was practicable to make hay; and the only grass in that section from which it was practicable to make it in time to have the deliveries commence at Tongue River on the 1st day of October, the day named in the contract for the commencement of the deliveries.

32

XII.

(Allowed at defendants' request.)

The communication referred to in the last paragraph of Finding I was not received at Fort Buford until September 4. It took ordinarily from a week to two weeks for a communication from Saint Paul to reach Buford, as the mail left Bismarck but once a week, and it took six days to get to Buford from that point. There was a telegraph from Saint Paul to Bismarck only.

XIII.

(Allowed on defendants' request.)

When the contract was made, General Card had never been in the Yellowstone region. Although he did not know personally how much grass there was standing on the Big Meadows, he supposed there was a large quantity. In the communication of August 24, mentioned in the second finding, General Card gave directions that contractors should be supported in every just and needful way.

XIV.

(Allowed at the defendants' request.)

Although the formal agreement in writing was made with Leighton & Jordan on the 29th of August, the season was so far advanced and the emergency so great, that the contractors had been previously told to begin and hurry on the work, and had been prosecuting it vigorously for six or seven days before the written agreement was made.

XV.

(Allowed on the defendants' request.)

The only notice which General Hazen is shown to have received from General Card of the contract with the claimant is as follows:

On the 24th of August, in the letter of that date already referred to, General Card wrote: "I have made a contract with Durfee & Peck for hay and wood at Tongue River, so that it will not be necessary to provide at Buford any hay for that point, and I will not, therefore, send up a hay-press."

This letter was received on the 4th of September, several days after Leighton & Jordan had commenced cutting the grass on the Big Meadows. The guard mentioned in the third paragraph of Finding IV was stipulated for by the contractors in their proposal of August 29, to prevent the hay from being destroyed, and was on the ground when the claimants' agent arrived at the Big Meadows on the 7th September. The following is a copy of that portion of General Hazen's letter of the 4th of September by which he informed General Card that the claimant, in his opinion, would be unable to furnish the hay contracted for:

"Two out of the last three contracts made for hay by the quartermaster's department at this post have failed, from the fact that the great difficulties of getting hay in this country were not understood by the contracting parties.

"The arrangement with Mr. Jordan, representing Mr. A. C. Leighton—the only one of the three referred to who fulfilled his con-
33 tract—to cut hay here, was made upon the authority of the chief quartermaster, and he is now, after considerable expense, well engaged and progressing in the work.

"The lateness of the season, frost having already appeared, the mistake in expecting that the Yellowstone will much longer afford any reliable means of transportation, the report of all parties that no hay can be cut in the vicinity of Tongue River, lead me to believe that to stop Mr. Jordan's work now is to interrupt the only judicious means of getting hay at all at the new post.

"I would recommend that hay-presses still be sent."

XVI.

(Allowed on the request of the defendants.)

The claimant's agent first arrived at Big Meadows on the morning of the 7th of September. He saw Leighton, one of the firm of Leighton & Jordan, and asked him on whose authority and for what place he was cutting the hay. Leighton replied that it was on the authority of General Hazen, and for the cantonment at Tongue River. The agent then returned to Fort Buford, and saw General Hazen, and asked him on whose authority Leighton & Jordan were cutting the hay on the Big Meadow. General Hazen answered that, by a letter from General Card, he was authorized to let the hay in open market; and he had let it for the cantonment at Tongue River. The agent told General Hazen that he was the agent of the claimant, who held from General Card the contract to furnish the hay for that cantonment, and that he fully expected to cut the hay on that meadow, and that that was the only hay that he knew with which to fill the contract. It does not appear that General Hazen made any reply to this statement of the agent, or that the agent in any other way asserted a right to the grass on said meadows on behalf of his principle as against Leighton & Jordan, or requested to be put into possession thereof, or intimated that he then desired or expected to cut hay in that vicinity. He did state his intention of sending his haying force to Tongue River to try to fill the contract there.

The contract with Leighton & Jordan, referred to in paragraph 2 of Finding IV, authorized them to cut 1,000 tons of hay on points within 30 miles of Fort Buford, and without cutting on the Big Meadows they could not have executed it.

XVII.

(Allowed at defendants' request.)

It was not customary for the commandant at Buford to furnish an escort farther than Glendive, the next post. There were but from thirty to fifty men at the post, and General Hazen did not deem it necessary to furnish protection to the claimant's party from his post further than to supply them with arms. General Hazen was of opinion that the claimant could not get the quantity of hay contracted for in the vicinity of Tongue River post. The claimant sent men and teams to Tongue River at three different times, as they arrived from Bismarck at Fort Buford. The application for an escort at Glendive was by the second party, or train, consisting of three teams and eight men. Glendive was a small post

for the protection of government freight landed there, because it could not be carried farther on the river, and it does not appear that there was sufficient force there to furnish an escort for the detached parties of the claimant; but the commandant did, on the occasion referred to, send a squad of from five to seven men with the claimant's party as far as Custer Creek, half-way to Tongue River. The commandant at
34 Tongue River refused to furnish the escort referred to in the seventh paragraph of the fourth finding, because he had no animals, and his command was so small for the work he had to do that he could not furnish an escort or animals, General Miles being at that time in the field. This request was made about the 2d October. It was about the 12th October that the interview with General Hazen, referred to in the seventh paragraph of Finding IV, took place. The claimant's agent informed General Hazen in that interview that he had searched the entire Tongue River country over, and that it was impossible to get hay there, and that it would be impossible to fill the terms of the contract unless they could buy hay or use the hay that Leighton & Jordan had cut. General Hazen thereupon wrote the following letter to the Assistant Adjutant-General:

HEADQUARTERS, FT BUFORD, D. T.,
October 12th, 1876.

SIR: Mr. McLean, of the Tongue River wood and hay contract, called to see me to-day. He has brought all their haying implements out of that country, and has put all their force to cutting wood. Their talk about buying hay cut here, on the telegraphic authority of General Card, I now believe to be moonshine, in order to gain time and deliver the wood, and then go to the courts for relief.

I think the people up there are compelled to take wood for actual use. They talk about buying 300 tons to bale and haul by wagons.

The hay here, baled, would cost them at least $25.00 per ton	$7,500 00	
It will take 20 days to make the trip, and, with a ton each to a 2-horse team, @ $5.00 per day, will cost	30,000 00	
		$37,500 00
For which they will receive, say		10,000 00
Leaving a loss of		27,500 00

Which is much more than the wood contract is worth, as it costs double what they calculate to cut it. Besides, Mr. McLean is not authorized to speak for his partners, and proposes to go below to see them before he begins to do anything. This will consume so much time, and the whole arrangement carrying a large loss to the contractors were it completed in the most favorable manner, and his statement that he could do nothing even in the manner proposed without having military escorts, leaves me fully impressed that nothing will be done, or is intended to be done, with the hay, but that *that* they do expect to put in the wood, with the full benefits accruing from that portion of the contract.

I am, very respectfully, your obedient servant,
(Signed) W. B. HAZEN,
Colonel 6th Infantry,
B'v't Major-General, U. S. A., Commanding.

The ASSISTANT ADJUTANT-GENERAL,
Department of Dakota, St. Paul, Minn.

XVIII.

(Allowed at defendants' request.)

The quartermaster applied to General Card for authority to buy the machines referred to in Finding VI, but it was not granted.

XIX.

(Allowed at defendants' request.)

In consequence of the peculiar circumstances under which the transportation of the said 301,324 pounds of hay delivered at Tongue River was effected, it was necessary to transport from Fort Buford and the Big Meadows with each train all the forage and rations required
35 for the sustenance of all the men and teams engaged in that service, including as well those employed in transporting the hay delivered, and their supplies for the return trip as well as that to Tongue River were necessarily carried with each train all the way until needed for use. The hired teams were hired for the round trip.

CONCLUSION OF LAW.

That the claimant is entitled, for the reasons set forth in the opinion of the court, to have and recover from the defendants the sum of forty-three thousand one hundred and thirteen dollars and sixty-three cents.

36 IV. *Requests of claimant for additional findings of fact and rulings of the court thereon.*

And now comes the claimant and asks the honorable court for an additional finding of facts in the above-entitled cause, viz:

"Whether there was any, and, if any, what was the market rate or cost of transportation from Fort Buford to the Tongue River cantonment during the autumn and winter of 1876-'7, and whether the claimant, in response to advertisements for proposals by the chief quartermaster of the Department of Dakota, submitted a proposal for doing said transportation, and offered sufficient security to enter into a contract and perform the same for such proposed sum, and the date and terms of said proposal."

Respectfully,

JOHN B. SANBORN,
Att'y for Claimant.

37 Upon the foregoing request the court ruled as follows: Allowed in form, as shown in finding X:

And now comes the claimant by his attorney, John B. Sanborn, and respectfully requests the honorable court for a finding of fact additional to the facts found in the fourth paragraph of the second finding, upon the following point, viz:

"Whether, with the exception of the grass growing on said 'Big Meadows,' and the small quantity found and cut near the Tongue River cantonment referred to in said findings, there was, at the date of the execution of said contract any grass suitable for hay on the Yellowstone or

Missouri Rivers, or anywhere within five hundred miles of said cantonment."

Washington, February 3rd, 1879.

JOHN B. SANBORN,
Claimant's Att'y.

Upon the foregoing request the court ruled as follows: Allowed in form, as shown in finding XI.

38 V.—*Requests of defendants for additional findings of fact and rulings of the court thereon.*

Defendants' requests for findings.

In addition to the last paragraph of the second finding of the court, the following finding is requested:

"This communication was not received at Fort Buford until September 4th. It took, ordinarily, from a week to two weeks for a communication from St. Paul to reach Buford, as the mail left Bismarck but once a week, and it took six days to get to Buford from that point; there was a telegraph from St. Paul to Bismarck only."

Upon the foregoing request the court ruled as follows: Allowed as finding XII.

In addition to the second paragraph of the third finding, the following is requested:

39 "When the contract was made, Gen. Card had never been in the Yellowstone region. It does not appear that he had any knowledge or information as to the quantity of grass at the Big Meadows, or thereabouts, but he supposed there was a large quantity there. In the communication of August 24th, mentioned in the second finding, Gen. Card gave directions that contractors should be supported in every just and needful way."

Upon the foregoing request the court ruled as follows: Allowed in form as shown in finding XIII.

In addition to the second paragraph of the fourth finding, the following is requested:

"Although the formal agreement in writing was made on August 29th, the season was so far advanced and the emergency so great, that
40 the contractors had been previously told to begin and hurry on the work, and had been prosecuting it vigorously for six or seven days before the written agreement was made."

Upon the foregoing request the court ruled as follows: Allowed as finding XIV.

In addition to the third paragraph of the fourth finding, the following is requested:

"Gen. Hazen learned of the contract from the communication of August 24th, mentioned in the third finding. Gen. Hazen had no notice from Gen. Card in that or any other way that there was any agreement or understanding with claimant that he could appropriate the grass on the Big Meadows, or in any other locality. He did not know, until informed by claimant's agent, on September 7th, that claimant had expected to cut the grass for his contract where Leighton and Jor-
41 dan were cutting, and his previous notification to the latter parties had no reference to the subject of appropriation of the grass.

"The guard mentioned was stipulated for by the contractors in their proposal of August 29th, to protect the hay and keep it from being destroyed, and was not furnished after notice of claimant's contract, or to prevent claimant from cutting grass on the meadows. In informing Gen. Card before claimant's agent arrived, that claimant, in his opinion, would be unable to furnish the hay contracted for, Gen. Hazen had reference to the lateness of the season, to reports that hay could not be obtained in the vicinity of Tongue River, and the anticipated failure of navigation of the Yellowstone.

"For the reasons indicated by Gen. Hazen, the claimant could not, in fact, with the means at his disposal, have cut, cured, baled, and delivered 800 tons of hay at Tongue River post at the contract prices
42 after his agents arrived at Buford, on September 6th, without very great loss."

Upon the foregoing request the court ruled as follows: Allowed in form as shown in finding XV.

In addition to the fourth paragraph of the fourth finding:

"The agent, on his arrival, found that the Yellowstone could not be used to transport the hay to Tongue River."

Upon the foregoing statement of this request the court ruled as follows: Disallowed, because already found in substance in findings I and IV.

"He made no objection to Leighton and Jordon's cutting hay on the Big Meadows."

Upon the foregoing statement of this request the court ruled as follows: Allowed in form as shown in finding XVI.

"They did not cut all of the 800 tons there; they cut from 200
43 to 250 tons on what is known as upland prairie in October, on the Missouri, above the mouth of the Yellowstone, and this, and other like grass in that vicinity could have been cut by claimant in September, if he had desired to. It was much thinner, however, than the meadow grass, and not so profitable to cut."

Upon the foregoing statement of this request, the court ruled as follows: Allowed in form as shown in finding XI:

In addition to the fifth paragraph of the fourth finding, the following is requested:

"The conversation between Gen. Hazen and claimant's agent took place on September 7th, after the agent's return from the Big Meadows. The agent did not assert any right to the grass on said meadows on behalf of his principal as against Leighton and Jordan, or request to be put in possession thereof, or intimate that he then desired or ex-
44 pected to cut hay in that vicinity; but stated his intention of sending his haying force to Tongue River, to try and fill the contract there. If he had asked to be put in possession of any grass on Big Meadows or on Fort Buford reservation, Gen. Hazen would have granted his request. There was no agreement with Leighton and Jordan, appropriating grass on the Big Meadows to their use. It had never before been cut. Gen. Hazen at that time had not been on that part of the reservation, and had no knowledge of the quantity of hay that could be made there."

Upon the foregoing request the court ruled as followsl: Alowed in form as shown in finding XVI:

In addition to the sixth paragraph of the fourth finding the following is requested:

45 "It was not customary for the commandant at Buford to furnish an escort further than Glendine, the next post. There were but from thirty to fifty men at the post and Gen. Hazen did not deem it necessary to furnish protection to the claimant's party from his post further than to supply them with arms. Gen. Hazen was of opinion that claimant could not get the quantity of hay contracted for in the vicinity of Tongue River post. Claimant sent men and teams to Tongue River at three different times as they arrived from Bismarck, at Fort Buford. The application for an escort at Glendine was by the second party or train consisting of three teams and eight men. Glendine was a small post for the protection of government freight landed there because it could not be carried further on the river, and it does not appear that there was sufficient force there to furnish an escort for the detached parties of claimant, but the commandant did on the occa-

46 sion referred to, send a squad of from five to seven men with the claimant's party as far as Custer Creek, half way to Tongue River."

Upon the foregoing request the court ruled as follows: Allowed as part of finding XVII.

In addition to the seventh paragraph of the fourth finding the following is requested:

"The commandant refused to furnish the escort because he had hardly sufficient troops under his command to protect the post. The request was made October 2nd. The result communicated to Gen. Hazen by the agent was that he had searched the entire Tongue River country over and that it was impossible to get hay there. This was about October 12th. The agent did not then propose to cut hay, but talked of buying some and transporting it to Tongue River."

47 Upon the foregoing request the court ruled as follows: Allowed in form as shown in finding XVII.

In addition to the eighth paragraph of the fourth finding the following is requested:

"The information of the agent's demand was that the agent stated that he could do nothing, even in the manner proposed, without escorts, and the proposition was to buy and transport hay, which the claimant made no attempt to do, though Gen. Hazen was anxious that he should."

Upon the foregoing request the court ruled as follows: Allowed in form as shown in finding XVII.

In addition to the fifth paragraph of the fifth finding the following is requested:

"The actual cost for the particular wagons employed was not

48 shown, but it was shown what the cost of such wagons was; how long they would last in such service; what sum per diem would represent the natural wear and tear thereof; the replacing of broken and spare parts in winter service, necessary repairs, and equipment."

Upon the foregoing request the court ruled as follows: Refused because these are not ultimate facts proper to be embodied in a finding of facts.

In addition to the sixth paragraph of the fifth finding the following is requested:

"To effect the delivery of the 301,341 pounds of hay at Tongue River

the service was required of a sufficient number of teams to transport the entire subsistence of all the men and animals employed for the round trip at the rates of allowance mentioned in the preceding paragraph.

The cost of transporting a given weight of forage and rations for
49 consumption en route was the same for a like weight of the hay delivered. In such transportation there was an ordinary and natural shrinkage and wastage of from ten to twenty per cent in the weight of hay delivered from that at the time of starting."

Upon the foregoing request the court ruled as follows: Refused because the court has already found the cost of the transportation of such rations and forage.

In addition to the sixth finding the following is requested:

"The quartermaster applied to Gen. Card for authority to buy the machines, but it was not granted and the claimant's agent was notified of the result. When the quartermaster in consequence of such refusal declined to pay the value claimant consented to take a certain rate for hire which was more than the quartermaster was willing to pay.
50 The claimant never offered to take the machines away from the reservation or asked to have them delivered to him there or elsewhere."

Upon the foregoing request the court ruled as follows: The statement that "the quartermaster applied to Gen. Card for authority to buy the machine, but it was not granted," is allowed as finding XVIII. The statement, "and the claimant's agent was notified of the result," is refused for want of evidence. The statement, "When the quartermaster in consequence of such refusal declined to pay the value, claimant consented to take a certain rate for hire, which was more than the quartermaster was willing to pay," is refused because contrary to the evidence. The statement that, "The claimant never offered to take the machines away from the reservation or asked to have them delivered to him there or elsewhere," is refused for want of evidence.

51 In addition to the fifth paragraph of the ninth finding the following is requested:

"In consequence of the peculiar circumstance under which the transportation of the said 301,324 pounds of hay delivered at Tongue River was effected, it was necessary to transport from Fort Buford and the Big Meadows with each train all the forage and rations required for the sustenance of all the men and trains engaged in that service, including as well those employed in transporting the hay delivered and their supplies for the return trip as well as that to Tongue River were necessarily carried with each train all the way until needed. The hired teams were hired for the round trip."

Upon the foregoing request the court ruled as follows: Allowed as finding XIX.

In connection with this paragraph and the last paragraph of the fifth finding, the court is asked to state, in a finding, if the amounts
52 therein respectively stated as the cost of transportation of the forage and rations consumed en routes are obtained from evidence of the amounts actually paid for the same by the defendants, and if not, upon what principle or mode of estimation the same were obtained; and if it was obtained by taking $8.00 per diem to be the cost or hire of a train employed in hauling such supplies, to state if that was not shown by the evidence to be the daily cost or hire of a train at Tongue River post during the period in question and not otherwise.

Upon the foregoing request the court ruled as follows: Refused.

In connection with the last paragraph of the ninth finding, the court

is asked to state in a finding whether in the estimate of damage therein set forth the additional cost of extra haul mentioned in the last paragrap of the seventh finding was included, and, if so, to what
53 amount. Also if the cost of building any winter quarters, as set forth in the seventh finding, is included, and, if so, to what amount; and if any other item of claim or damage is therein included, to state the nature and amount of the same. And the court is requested also to find and state the number of cords of wood hauled for a greater distance than would have been necessary under the contract, which were hauled on and after 19th December, 1876.

Upon the foregoing request the court ruled as follows: Refused.

THOMAS SIMONS,
Assistant Attorney General.

54 VI. *Opinion of the court.*

DAVIS, J., delivered the opinion of the court:

On the 26th of August, 1876, the claimant and the chief quartermaster of the Department of Dakota, on behalf of the defendants, signed a written contract at Saint Paul's, in Minnesota, whereby the claimant agreed to furnish to the defendants at or near the mouth of Tongue River, in Montana Territory, 800 tons of hay, the delivery to begin on or before the 1st October, and also 6,000 cords of good soft wood; and that in case of failure on his part to deliver any of the supplies the defendants might supply the deficiency, and that any moneys which might be due him from them might be used by them to pay the difference in cost. The defendants, on their part, agreed that the 6,000 cords of wood might be cut on any part of the reservation at Tongue River outside of a circle of half a mile from the adjutant's office at that post, and that they would pay the claimant for the hay at the rate of $34.75 per ton, and for the wood at the rate of $8.65 per cord.

The claimant failed to deliver the hay; and the defendants supplied themselves with about 160 tons, which was enough for their wants. The claimants cut and delivered the 6,000 cords of wood, the contract price for which amounted to $51,900. The defendants claimed to apply to the payment of this the sum of $40,980.63, which they said was the difference in cost to them between the contract price of the amount of hay delivered to supply the deficiency and the sum they actually paid for it, and they offered to pay the claimant $10,919.37 in full for the 6,000 cords of wood. The claimant refusing to receive this in full, the case was referred to the Secretary of War, who directed the Quartermaster-General to pay the claimant the said sum of $10,919.37, as the department could allow no greater sum, and that, in order that the claimant might bring suit for the recovery of the alleged balance, he should be required to receipt for the amount as found due and allowed by the War Department, and would not be required to execute a receipt in full of all demands under his contract. The payment was made and the receipt given in accordance with the terms of this order.

The claimant in this action seeks to recover—

1st. The said sum of $40,980.63, which is admitted to be due him on his wood contract if the defendants are not entitled to apply to the payment of the contract price of the wood the difference between the actual cost of the hay and the contract price of the same.

2d. The difference between the cost of cutting and hauling 1,500 cords of dry wood and 1,500 cords of green wood, the claimant having been required by the defendants' agent to deliver 1,500 cords of dry wood as a part of said 6,000 cords.

3d. The loss of the claimant by reason of his teams remaining idle for ten days while the defendants' agent was deciding on what part of the reservation at Tongue River he would be allowed to cut.

4th. Compensation for the injuries which the claimant suffered by reason of his being required to cut 3,300 of said 6,000 cords at a
55 greater distance from the adjutant's post than outside of a circle of one-half mile distant therefrom.

These claims are made under the contract. The claimant further seeks to recover in this action—

5th. The value of a steam hay-press and of a beater press, his property, which came into the possession of the defendants' agents at Fort Buford, and which they used there, and which, so far as appears, are still in their possession.

We will consider these claims in their order.

1. The claimant contends that his contract to deliver hay at Tongue River, though general in form, was, in fact (and was understood by both parties to be), a contract to deliver certain specific hay, to be cut from a place known as Big Meadows, near Fort Buford, and to be transported thence by water to Tongue River. He maintains that he has the right to prove conversations which took place between himself and the quartermaster with whom the contract was made at the time of its signing, which, he says, substantiate this fact. He further contends that it was dangerous for transportation trains to travel during that season in that section of the country without a military escort; that his contract gave him the right to such protection to the extent of the power of the post commander; that he demanded such protection from the commandants of three different posts and all refused to furnish it; and that he was thereby released from his obligation to deliver hay under the contract.

The defendants maintain that the claimant cannot by parol evidence vary or explain the written contract, and that the refusal to furnish an escort did not relieve the claimant from his obligation to deliver the hay.

The question how far parol evidence may be introduced in actions at law to explain written contracts affords as wide a range of conflicting authorities as any subject that can come before a court. Happily this court is required by law to look to the highest Federal tribunal for its guidance, and when it finds light there, is not expected to look elsewhere. The general doctrine of the common law on this point is tersely stated in a recent opinion of that court:

"A written contract merges all previous negotiations, and is presumed in law to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions may be very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."*

The case of Bradley, plaintiff in error, vs. The Washington, Alexandria and Georgetown Steam Packet Company, defendants in error,† explains what the court mean when they speak of the "subject matter of a contract and the sense in which the parties may have used particular terms."

*Brawley's case, 96 U. S., 173-4. †13 Peters, 89.

On the 19th November, 1831, the plaintiff in error entered into the following written agreement with the defendant in error: "I agree to hire the steamboat Franklin until the Sidney is placed on the route, to commence to-morrow, 20th instant, at $35 per day, clear of all expenses other than the wages of Captain Nevitt." The Franklin was placed on the route on the 20th November, and continued running until the 5th December. Navigation was then closed by ice, and continued closed until the 5th February, 1832. The Sidney was placed on the
56 route on the 7th February. The owners of the Franklin sued in assumpsit to recover the per diem contract price for the Franklin up to and including the 6th February. In order to explain the subject-matter of the contract and the sense in which the parties used the particular terms, Bradley offered to prove certain facts which are recited in the opinion of the Supreme Court. The court below refused to permit these facts to be proved. The Supreme Court, in reviewing the decision of the court below, laid down the following propositions:

"It is a principle recognized and acted upon by all courts of justice, as a cardinal rule in the construction of all contracts, that the intention of the parties is to be inquired into, and, if not forbidden by law, is to be effectuated.

"In giving effect to a written contract, by applying it to its proper subject-matter, extrinsic evidence may be admitted to prove the circumstances under which it was made whenever, without the aid of such evidence, such application could not be made in the particular case."

Applying these principles to the particular case they said: "Had the evidence been received it would have disclosed the following state of facts: that the route mentioned in the contract was one on which the plaintiff in error transported passengers and also the mail; that the steamboat Sidney mentioned in this contract was designed to perform this service; that the Franklin was wanted for the same purpose; that the Sidney was then in Baltimore for the purpose of being fitted with her engines and equipments; that, although the transportation of passengers and the mail was carried by the plaintiff in error by a steamboat while the river was open, yet when the river was closed by ice so that navigation was obstructed, the plaintiff in error then transported passengers and the mail all the way overland to Fredericksburg; that when the river was thus obstructed the plaintiff in error did not and could not use a steamboat; and that all these facts were known to the defendant in error. We think this evidence ought to have been received, because it would have tended to show, by the circumstances under which the contract was made, what was the intention of the parties; and, in the language of the rule which we have laid down, that the contract, without its aid, could not be applied to the proper subject-matter. * * * The subject-matter of the contract was not merely the steamboat Franklin, but the steamboat Franklin under the circumstances under which it was hired. The parol evidence, then, in this case was admissible; because, without its aid, the written contract could not be applied to its subject-matter."

In order to determine whether these principles are applicable to the present case we must first ascertain what the findings show to have been the subject-matter of the contract between these parties. Having ascertained that, we shall be in a position to determine whether they can properly be taken into consideration in construing the contract and in applying it to its subject-matter.

The following propositions are clearly established by the findings:

1st. Prior to the year 1876 the Sioux Indians were in the habit of wintering in the valley of the Yellowstone. In the summer of that year there existed between them and the United States a state of war, made memorable by the massacre of the gallant Custer and his command. Soon after that appalling event it was determined to maintain a cavalry and infantry garrison in the heart of the Yellowstone at its junction with Tongue River, and another garrison at Glendive, about one hundred miles lower down the river. The short summer season was already far advanced when this decision was reached. The proposed new
57 settlement at Tongue River was five hundred miles removed from any settlement which could furnish supplies or teams for their transportation, and still further removed from a market.

2d. Cavalry garrisons at remote stations are ordinarily supplied with hay cut from neighboring government lands. On the 9th August, 1876, the chief quartermaster of the Department of Dakota ordered the grass on a tract called the Big Meadows, about twelve miles from Fort Buford (which is situated opposite the junction of the Yellowstone and the Missouri), to be cut for the use of the garrison at Tongue River. The order went by letter to the regimental quartermaster at Fort Buford, who, on receipt of it, contracted with parties there by the name of Leighton & Jordan to cut the said grass for that purpose; and, in pursuance of that contract, the grass was cut accordingly. In the emergency the quartermaster also wrote to several contractors, among whom was the claimant, inviting proposals for supplying hay and wood at Tongue River. The claimant made proposals which were accepted, and on the 26th August the contract on which this suit is brought was signed at Saint Paul.

3d. At the time of signing said contract there was no grass in the valley of the Yellowstone suitable for making hay, except on the said Big Meadows, and on some smaller tracts which were subsequently cut for delivery at Tongue River and charged against the claimant by the quartermaster. All the rest had been destroyed by the Indians. These facts had been reported to General Card, the chief quartermaster of the department, and were known to him when he made the said contract with the claimant. At that time both the claimant and General Card supposed there was no grass on the Yellowstone, except at Big Meadows, and it was then intended by both that the said contract should be executed by cutting the grass on the Big Meadows, which was afterwards cut by Leighton & Jordan under authority derived from General Card. This was the only grass on or near the Yellowstone from which, after the arrival of the claimant's teams at Fort Buford, it was practicable to make hay in time to have the deliveries begun on the 1st day of October, the day named in the contract for the commencement of the deliveries.

4th. At the time of signing the contract the claimant told the chief quartermaster that he did it under the expectation that the transportation between Fort Buford and Tongue River could be made by water; to which the quartermaster made no reply. At that time the chief quartermaster had reason to believe that the Yellowstone was not navigable above Glendive, but he did not communicate it to the claimant. Both parties then knew that if the transportation could not be made all the way by water, the transportation alone would cost the claimant a sum far beyond what he was to receive for the hay when delivered. In point of fact, the river was not navigable as far as Tongue River after September 1.

5th. Until the 6th September the claimant or his agents did not know,

and had no means of knowing, that the grass on the Big Meadows was being cut by order of said chief quartermaster. On that day a large force of the claimant's men and teams arrived at Fort Buford from Bismarck, about two hundred and fifty miles distant, for the purpose of cutting the grass on the Big Meadows, and found Leighton & Jordan cutting it under the said contract made with them by order of the chief quartermaster. It was then too late for the claimant's agent to return to the settlements with his teams and men, and obtain hay there in time to commence the deliveries within the contract term. The claimant's agents made great exertions to find grass in the valleys of the Yellowstone and Tongue Rivers, but failed to do so, except for a small
58 amount. The hay with which the deficiency was supplied was to a small extent furnished from grass cut in these valleys, and principally from the said hay made at Big Meadows and Tongue River.

These are the principal facts in this case. They leave on our minds no doubt that the subject-matter of the contract, so far as it related to hay, was hay to be cut by the claimant on the Big Meadows. The same hay which was cut by Leighton & Jordan under an agreement made with them by authority of the same quartermaster who contracted with the claimant. Guided by the principles laid down by the Supreme Court in the two cases we have cited, and by their mode of applying the principles to the facts in the case in Peters, we are of opinion that the facts which we have recited must be taken into consideration in construing this contract, and that they establish that it was a contract for cutting and delivering that particular hay. The claimant was prevented from doing this by the act of the defendants. Upon the general principle that where one party to a contract prevents the other party from fulfilling his agreements, no damages for the breach can be recovered, we are of opinion that the defendants wrongfully withheld from the claimant so much of the pay for the wood as they maintained was the difference in cost between the contract price of the hay and its cost to them.

This conclusion fully accords with the substantial justice of this case. In a time of pressing emergency the claimant responded to the government's call by placing his means and his energies at their service with unusual promptitude. In eleven days from the signing of his contract a large force of men, with all the requisite teams and tools, mowers, and presses, had traveled 250 miles over the rough roads of an unsettled country and presented themselves at the Big Meadows for work. In eleven days more a like force, with the requisite means for cutting and hauling wood, had traversed the then dangerous country of the Yellowstone and arrived at Tongue River. If, in addition to the loss in bringing his forces to Fort Buford in vain, the letter of the law were to require this court to fine him over $40,000 for the non-delivery of 150 tons of hay, a great injustice would be perpetrated. The authorities in the War Department were sensible of the value of such energy and zeal on the frontier. Being doubtful as to his legal rights, instead of deciding his claim adversely in the ordinary binding way, they took from him an unusual form of receipt, in order to leave him free to pursue his remedies here.

It is due to the officers who acted for the government in this matter, to say that there is absolutely nothing in the record to warrant the strictures which were made upon them in the argument of the case by the claimant's counsel. It was their duty, in an unusual and pressing military exigency, to spare no effort and omit no precaution in order to prevent the new station at Tongue River from being without supplies

when winter should set in. If, in the steps taken to insure this, two contracts were made applicable to the same thing, the defendants, when their contract with the claimant fell through in consequence of their own act, were subjected to no expense which they would not have been subjeted to had the contract with the claimant never been made.

The view which we have taken renders it unnecessary to consider whether the condition of the Yellowstone, whereby navigation was made impossible, affected the claimant's liability to perform his contract, or whether it was affected by the repeated refusals to furnish military escort, or what amount the defendants would have been
59 entitled to retain if their views of their rights had been sustained. It is proper, however, to remark that the findings show that the claimant is entitled in any event to recover several thousand dollars on this branch of his case.

II. The claimant's contract required him to deliver 6,000 cords of good soft wood. The quartermaster at the post required him to cut and deliver 1,500 cords of dry soft wood as part of it. The claimant's agent objected at first, but eventually delivered the required amount of dry wood, asserting a right to payment at a higher rate than for so much green wood.

We think the claimant must be paid for the dry wood at the same rate as the green wood. Tongue River station was a new station, in a high latitude, where winters were long and severe. These facts were known to the claimant, and as both the green wood and the dry wood were cotton (or soft) wood, and the contract is silent on the subject, we think it reasonable to construe it as authorizing the defendants to require so much of the whole as was intended for the first winter's consumption to be delivered in a kind of soft wood capable of immediate use, provided such wood could be found within the authorized distance.

III. When the claimant's agent had finished cutting and hauling the dry wood the commandant was absent. The claimant could have proceeded to cut green wood from without the reservation, but, in the belief that on the commandant's return he would be allowed to cut within the reservation, he preferred to wait. His teams were therefore idle of his own choice. We think he cannot require the defendants to compensate him for this voluntary idleness.

IV. The claimant's contract permitted him to cut the wood on any part of the military reservation at Tongue River, outside of a circle of one half of a mile from the adjutant's office at that post. He was required to cut, and did cut and haul 3,300 cords, more than half a mile from that post, and claims damages for this breach of the contract.

From their arrival at Tongue River up to the 25th October, the claimant's men and teams had been employed in cutting and hauling the dry wood. From the 25th October till the 4th November, they were idle, because in the absence of the commandant no wood could be cut within the reservation. On the return of the commandant they were allowed to cut, and did cut and haul the 3,300 cords as stated. The claimant was put to a greater expense by reason of this, but he acquiesced in the order of the post commander, and cut the wood outside of the line where his contract required him to cut it, and hauled and delivered it without complaint, and made no claim to be paid for it until the defendants proposed to pay the wood contract by the damages on the hay contract. The claim which he now sets up was an afterthought. With some hesitation we have reached the opinion that these facts bring the

present case within the principles announced in Francis' case,* and that the claimant is not entitled to recover on this account.

V. The defendants' contract with the parties who cut the hay at Big Meadows required that the defendants should furnish the machines for pressing and baling it. They had no such machines at Fort Buford. The claimant, however, had forwarded thither two machines in the expectation that they would be used in his hay contract. Not being so used he asked permission to store them at Fort Buford. The quartermaster assented, and offered to take charge of them. He also proposed to the claimant's agent to buy them if he could get authority from his superior in order to use them in baling the hay at Big Meadows. He further proposed, in case he could not get authority to buy them, to
60 hire them. The claimant's agent refused to let them for hire, but offered to sell them. The chief quartermaster of the department refused permission for the purchase, but the agent had left Fort Buford before the answer came, and it was never communicated to him.

The contract with Leighton & Jordan required the defendants to furnish the machines for pressing and baling the hay. There were no such machines there except those belonging to the claimant. Without further communicating with the claimant or his agent, the quartermaster at Fort Buford used the claimant's presses for that purpose, and when he had done with them, left them on the banks of the Missouri, where they now are in a dilapidated condition. The claimant demanded pay for the machines at their value. The defendants refused to pay for them as a purchase, but offered to pay for their use. The claimant refused to accept this, and brings this suit.

On the principles laid down by us in Mason's case, at the present term, we are of opinion that the action can be maintained, and that the claimant is entitled to recover $387 as the value of the beater press, and $1,746 as the value of the steam hay-press.

Judgment will therefore be entered in favor of the claimant for the sum of $43,113.63.

61 VII. *Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 10th day of February, A. D. 1879, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Campbell K. Peck, claimant, do have and recover of and from the United States the sum of forty-three thousand one hundred and thirteen dollars and sixty-three cents ($43,113.63).

62 VIII. *Application of claimant for and allowance of an appeal.*

From the judgment rendered in the above-entitled cause on the tenth day of February, A. D. 1879, in favor of the claimant herein and against the defendants, the claimant comes, and by his attorneys, Sanborn and King, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

SANBORN & KING,
Att'ys for Claimant.

Filed April 7, 1879.

*96 U. S., 359.

And now, to wit, April 7, 1879, it is ordered that the appeal be allowed as prayed for.

63 IX. *Application of defendants for appeal and order allowing same.*

From the judgment rendered in the above-entitled cause on 10th of February, 1879, in favor of claimant, the defendants, by their Attorney-General, on the 9th day of April, 1879, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed April 9, 1879.

And now, to wit, April 9, 1879, it is ordered that the appeal be allowed as prayed for.

64 In the Court of Claims.

CAMPBELL K. PECK
vs.
THE UNITED STATES. } No. 11832.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the requests respectively of the claimant and of the defendants for additional findings of fact, and the rulings thereon, of the opinion of the court, of the final judgment of the court, of the application of the claimant for the allowance of an appeal to the Supreme Court of the United States and the order allowing same, of the application also of the defendants for the allowance of appeal and the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this twenty-third day of April, A. D. 1879.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Endorsement on cover:) No. 788. The United States, appellant, vs. Campbell K. Peck; and No. 789, Campbell K. Peck, appellant, vs. The United States. Court of Claims. Filed 15th July, 1879.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

No. 788.

THE UNITED STATES,
Appellant,

vs.

CAMPBELL K. PECK,

AND

No. 789.

CAMPBELL K. PECK,
Appellant,

vs.

THE UNITED STATES.

BRIEF AND ARGUMENT OF CAMPBELL K. PECK.

JOHN B. SANBORN,
Att'y for C. K. Peck.

Pioneer Press.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

THE UNITED STATES, Appellant,

vs.

CAMPBELL K. PECK, Respondent.

CAMPBELL K. PECK, Appellant,

vs.

THE UNITED STATES, Respondent.

STATEMENT OF THE CASE OF CAMPBELL K. PECK, APPELLANT.

The contract upon which this action was brought is in the following words, namely:

This agreement witnesseth, that the said Major Benjamin C. Card, quartermaster U. S. A., for and on behalf of the United States of America, and the said Campbell K. Peck, for himself, his heirs, executors, administrators and assigns, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

I. That the said Campbell K. Peck, his heirs, assigns, administrators and executors, shall supply, or cause to be supplied and

delivered, to the quartermaster's department at the military station of, at, or near the mouth of Tongue River, Montana Territory, eight hundred (800) tons of good, merchantable hay; the delivery of which shall commence on or before the first day of October, 1876, and be completed on or before the 31st day of January, 1877, and the deliveries shall be at the rate of two hundred tons per month or more, until the whole quantity shall have been delivered. Also, six thousand (6000) cords of good, soft wood, or such other greater quantity of wood as may be required from time to time for the wants of said station, during the fiscal year commencing July 1st, 1876, and ending June 30th, 1877.

II. That the said Campbell K. Peck shall furnish and deliver at said station the aforesaid wood and hay between the first of July, 1876, and the 30th of June, 1877, in such quantities and at such time as the receiving officer may require, as set forth in Article I of this agreement.

III. That the said wood and hay, when delivered, shall be subject to inspection on behalf of the United States, as provided for by General Orders No. 87, dated Headquarters Department of Dakota, October 31st, 1873.

IV. That in case of failure on the part of the said Campbell K. Peck, his agents, heirs and assigns, party of the second part, to deliver any part of the supplies as stipulated by this contract, then the party of the first part shall have power to supply the deficiency, by purchase or otherwise, and the said party of the second part shall pay the difference in cost, and any money due said party of the second part may be used and applied to such payment.

V. That payment shall be made in the customary manner upon the delivery of the supplies, as stipulated in Article I of this agreement, provided the voucher is complete, reciting that

the hay and wood has been inspected as required, and provided that the contractor is not indebted to the United States under Article IV of this agreement, in the funds furnished by the government for public disbursement; and in the event of the contracting officer being without funds when payment is due, the payment shall be made as soon thereafter as funds shall be received by him for that purpose.

VI. That the said Campbell K. Peck, party of the second part shall receive the sum of thirty-four dollars and seventy-five cents ($34.75,) for each and every ton of two thousand pounds of hay, and eight dollars and sixty-five cents ($8.65) for each and every cord of wood delivered and accepted, as stipulated in Articles I and III of this agreement; and that at any time when two hundred (200) tons of hay, and one thousand (1000) cords of wood shall have been delivered, inspected and received, a voucher may be made up and payment made thereon for one hundred tons of hay and five hundred cords of wood of the same; and thereafter for the quantity of hay and wood as delivered, until the last delivery under this agreement, when the one hundred tons of hay and five hundred cords of wood reserved shall be paid for.

VII. It is expressly understood that authority is granted to the party of the second part to cut for the purpose of executing this agreement, upon any part of the military reservation at the aforesaid station outside of a circle of one half a mile from the adjutant's office of that said post.

VIII. That the said party of the second part shall be entitled to military protection in the execution of this contract or agreement, whenever, from the hostilities of the Indians it may be deemed necessary by the post commander, whose duty it shall be to furnish protection to the extent of his power, this stipulation to give no foundation for any claim against the govern-

ment for damages from Indians, or for any detriment arising from their depredations or hostilities.

IX. It is expressly understood that this contract or agreement shall not be so construed as to involve the government in any obligation for the future payment of money in excess of the appropriations for the fiscal year ending June 30th, 1877.

X. It is further stipulated and agreed between the parties to this contract that, upon mutual agreement, it may be changed, altered, modified, or abrogated, in whole or in part; but no such change, alteration, modification or abrogation shall be interpreted as entitling the party of the second part to an increased rate or compensation over the rate or compensation specified in Article VI of this agreement.

XI. That no member of Congress, no officer or agent of the government, nor any person employed in the public service, shall be admitted to any share in this contract or agreement or to any benefit which may arise therefrom.

XII. That this contract or agreement is made subject to the approval of the commanding general of the Department of Dakota and of the Military Division of the Missouri.

In witness whereof the undersigned have hereunto placed their hands and seals the day and date first above written.

BENJ. C. CARD, [Seal.]
Quartermaster U. S. A.
CAMPBELL K. PECK. [Seal.]

In presence of
J. B. LOYD.
A. M. PETTIT.

The special attention of the Court is called to the last sentence of Article I, for a description of the quality of the wood, and to Article VII as designating the place where the appellant

might cut the same. The facts found by the court below, which show, as the appellant claims, that the United States broke and violated those provisions of the contract to his damage are as follows, to-wit:

There was no military reservation at Tongue River cantonment when the said contract was signed; but 600 men were stationed there. On the 11th September an order was issued for the reservation of an area of land 20 miles square, determined by a line drawn 10 miles north and south of the meridian through a point at the mouth of Tongue River, and 10 miles east and west of said meridian. The cutting of timber on the reservation was prohibited by said order.

The cantonment at Tongue River was situated about one-fourth of a mile south of the junction. All the wood within it, whether growing or dry, was cottonwood. On the Tongue River, near its mouth and below the junction of the Yellowstone, within the reservation, there was a large body of growing cottonwood. With this exception there was very little greenwood on Tongue River within the cantonment. It was necessary to go five or six miles from the post to find much greenwood on its banks.

There were also about 1500 cords of dry cottonwood on the reservation. Some of this was timber that had been felled by the Indians for the purpose of feeding their horses on the bark of the small limbs. These trees were scattered all through the other timber. A part of it was in one patch of about 25 acres that had been deadened by fire; the rest consisted of dry standing trees or of driftwood.

At that time 6,000 cords of green cottonwood might have been cut within a space of from half a mile to a mile and a quarter from the adjutant's quarters at said cantonment, and within three quarters of a mile to a mile from the quarters first established by the claimant, to be hereafter more particularly noticed.

Had the claimant been allowed to cut green soft wood in such space, he could have entirely fulfilled his agreements touching wood in said contract before January 10, 1877, and the necessary expense which he would have incurred at Tongue River in cutting and delivering the wood according to his contract would have been at the rate of $3.08\frac{1}{3}$ per cord.

An agent of the claimant arrived at Tongue River with nine teams and 32 men on the 19th September. He reported to the commandant, who directed him to cut some dry wood, and referred him to the quartermaster for the amount. The quartermaster said they would want 1,500 cords of dry wood. The agent replied, that it would cost more per cord to furnish dry wood than green, and that, as he expected a person soon with more authority than himself, he would not take the responsibility of furnishing dry wood.

On the 23rd September, the foreman who was to superintend the cutting, and who was the person so referred to as having more authority, arrived with three more teams and eight more men. He said that it would be a great deal more expensive to furnish dry wood than green and he objected to doing it. The quartermaster insisted however, that he should furnish 1,500 cords of dry wood.

The claimants agent thereupon did furnish as a part of the said 6,000 cords, 1,500 cords of dry wood between the 25th September and the 25th October. The necessary expense which he incurred at Tongue River in cutting and delivering at the cantonment the said 1,500 cords of dry wood was $5,540.

In order to provide against the inclemency of the season, the claimant's agent erected permanent quarters for his force about 800 yards from the post, and in sight of it, across Tongue River. The post was on the south side of that river, and the quarters were erected on the north side of it, in the large body of growing cottonwood already referred to. There was a cookhouse, a building for the men, a store-room and office, and about ten small cabins. All were built of logs, chinked and daubed, with dirt roofs. The cost of these improvements was $840.

On or about the 30th September, the claimant's agent was informed by Colonel Whistler, temporary commandant at the post, in the absence of General Miles, that he could not be allowed to cut green timber within a space of ten miles from the adjutant's office in the cantonment. He replied that the contract permitted the wood to be cut within a circle half a mile distant from the adjutant's office. The temporary commandant answered that the ten-mile order had been made by General Miles, and that he would not interfere with it.

On the 2d October the agent left Tongue River in order to see General Miles, who was then at Glendive. At the time of his leaving, the houses in the quarters were all built, roofed and chinked, but were not wholly completed.

On or about the 20th October, the foreman in charge of the claimant's work applied to the quartermaster to know where the wood was to be cut, and where he was to establish his winter quarters for cutting it. The quartermaster replied that he would not be permitted to cut down green timber within ten miles of the reservation.

General Miles returned to the post on or about the 4th of November. On the day after his return he showed the claimant's foreman where he would be permitted to cut the balance of the wood necessary to fill the contract. It was from two and one-half to five miles distant from the post, and not in the direction of the said quarters.

Without fault on the part of the claimant or his agents, 17 teams in the claimant's employ were idle and unemployed for ten days, between the time when they finished cutting and hauling the dry wood and the commencement of cutting green wood under said last-named direction of General Miles. The necessary expense to the claimant of said teams was $8 each per day, for the ten days.

In consequence of said direction by General Miles respecting the places from whence the wood should be cut, the claimant was obliged to abandon the said quarters, and to construct new

quarters about three miles distant from them. The old quarters, when abandoned, had no market value and were valueless to the claimant. The new quarters were necessary. Being further removed from the station, they were constructed so as to afford protection against Indians. They were finished in November, and cost $1,300.

On the 19th December General Miles, in writing, prohibited the claimant from cutting green timber within three miles from the mouth of Tongue River.

By reason of the delays to which he was subjected, and of the action of the defendant's agents in preventing him from cutting green soft wood on said reservation outside of a circle of one-half a mile from the Adjutant's office of the said post, the claimant was, without fault on his own part, prevented from performing his said contract, as he otherwise would, before the 10th January, 1877. Inclement weather and deep snow came on long before he could complete it. No work could be done after the 15th January, 1877, until spring. The claimant could not graze his stock, nor obtain forage or hay for it there, and was obliged to discharge 12 teams and 25 men that had been brought there at great expense, and to send them back to Bismarck. At the time when work was stopped in the winter 5,000 cords of wood had been cut, of which 2,750 had been delivered, and 2,250 had been accepted.

In the spring following other teams were hired to complete the contract. The last delivery was made on the 28th June, 1877.

In consequence of said orders the claimant was obliged to haul 3,300 cords of green wood a greater distance than he would have been obliged to haul the same had he been allowed to cut it outside of a circle of one half mile from said Adjutant's post. The additional cost of such extra haul incurred at and near Tongue River station was at the rate of $1.67\frac{2}{3}$ per cord.

And the court below held that the appellant, Campbell K.

Peck, could not recover against the United States anything on account of said work, labor and expenditures, or on account of said acts and transactions of the said agents and officers of the United States either as compensation for said work done and material furnished, or as damages for the breach of said stipulations and conditions of said contract, and gave judgment for the wood delivered at the contract price, and for the value of the beater and steam hay presses, deducting therefrom the ten thousand nine hundred and nineteen dollars and thirteen cents paid on account of said wood by direction of the War Department, leaving a balance for which judgment was entered of forty-three thousand one hundred and thirteen dollars and sixty-three cents ($43,113.63) only.

ASSIGNMENT OF ERROR.

The said Campbell K. Peck, appellant says that in giving the judgment and decree aforesaid in the record aforesaid contained, there is manifest error in this, to-wit: That the said Court of Claims after perceiving and finding as a fact, that the contract between said appellant and the United States contained the following provision namely:

"VII. It is expressly understood that authority is granted to "the party of the second part to cut for the purpose of execu- "ting this agreement, upon any part of the military reservation "at the aforesaid station outside of a circle of one half a mile "from the adjutant's office of that said post." And that a state of war existed throughout the region where said contract was to be performed (folio 22,) and that on the 19th day of December, A. D. 1876, General Miles, United States Army, Commander in said region, prohibited the said appellant from cutting green timber within three miles from the mouth of Tongue River, (folio 28,) and that in consequence of said orders the claimant

was obliged to haul 3,300 cords of green wood a greater distance than he would have been obliged to haul the same had he been allowed to cut it outside of a circle of one-half mile from said adjutant's post; and that the additional costs of such extra haul incurred at and near Tongue River Station, was at the rate of $1.67\frac{2}{3}$ per cord (folios 28 and 29,) making in the aggregate five thousand, five hundred and thirty-three dollars ($5,533,) and that upon the said payment by the War Department of $10,919.-37, to the claimant on account of said contract, he should not be required to execute a receipt in full for all demands under the same, and this in order that he might bring suit for the recovery of said alleged balance (folio 29) did conclude, determine and adjudged "that these facts bring the present case within the principles announced in Francis case (96 United States,359) and that the claimant is not entitled to recover on this account.

II.

And there is also manifest error in this; that said Court of Claims perceiving and finding as a fact, that the said contract between Campbell K. Peck, appellant, and the United States, required him to deliver 6,000 cords of good soft wood, and that the quartermaster of the post required him to cut and deliver 1,500 cords of dry wood, and that the cost and expense to the claimant of cutting and delivering said dry wood was $920.00 more than the cost of cutting and delivering an equal amount of green wood (folio 27 Record;) and that a state of war existed throughout said region where said contract was to be performed; and that upon said payment, by order of the War Department of $10,919.37 to the claimant, on account of said contract, he should not be required to execute a receipt in full for all demands under the same, and this, in order that he might bring suit for the recovery of said alleged balance, did conclude, determine and adjudge that the said appellant could not recover said $920.00, or any other sum on this account from the United

States, and was bound by the contract price for said dry wood the same as for green wood.

III.

And there is manifest error in this, to-wit: The said Court of Claims perceiving and finding the facts to be that: "Without fault on the part of the claimant or his agents, 17 teams in the claimant's employ were idle and unemployed for ten days between the time when they finished cutting and hauling the dry wood, and the commencement of cutting green wood under said last named direction of General Miles; and that the necessary expense to the claimant of said teams was $8 each per day, for the ten days, making in the aggregate $1,360 (folio 28 Record;) and that upon the said payment by the War Department of $10,919.37 to the claimant on account of said contract, he should not be required to execute a receipt in full for all demands under the same, and this in order that he might bring suit for the recovery of said alleged balance, did conclude, determine and adjudged that the respondents could not as a matter of law, be required to compensate the appellant for this detention.

IV.

And there is manifest error in this, to-wit: That the Court of Claims perceiving and finding the fact to be "that in order to "provide against the inclemency of the season, the claimant's "agent erected permanent quarters for his force about 800 yards "from the post, and in sight of it, across Tongue River. The "post was on the south side of that river, and the quarters "were erected on the north side of it, in the large body of "growing cottonwood already referred to. There was a cook "house, a building for the men, a store room, and office, and "about 10 small cabins. All were built of logs, chinked and "daubed, with dirt roofs. The cost of these improvements "was $840. And that in consequence of the said direction by

"General Miles, respecting the places from whence the wood "should be cut, the claimant was obliged to abandon the said "quarters, and to construct new quarters about three miles "distant from them. The old quarters when abandoned had "no market value and were valueless to the claimant. The "new quarters were necessary. Being further removed from "the station they were constructed so as to afford protection "against Indians. They were finished in November, and cost "$1,300;" and that upon the said payment by the War Department of $10,919.37 to the claimant, on account of said contract, he should not be required to execute a receipt in full for all demands under the same, and this in order that he might bring suit for the recovery of said alleged balance, did conclude, determine and adjudge that the said Campbell K. Peck, appellant, could not as matter of law, recover from the defendants said $840, nor said $1,300, nor any sum whatever, on account of said increased expense necessarily incurred in the execution of said contract.

V.

And there is manifest error in this, to-wit: That upon the several cases of action and grounds of damage, the Court below did give the judgment and decree aforesaid, against the appellant and in favor of the United States; whereas by the law of the land the same should have been given for the respective sums, amounts and damages aforesaid in favor of the appellant, and against the United States.

Wherefore and for other errors in the records and proceedings apparent, the appellant prays that said judgment and decree be modified and changed; and that in addition to the amount adjudged and decreed by the Court of Claims, he may have judgment for the respective sums named and specified in the assignment of errors aforesaid.

BRIEF OF CAMPELL K. PECK, APPELLANT.

I.

A party to a special contract, who has fully performed the same on his part, or has performed the same as far as the other party would permit, may recover in *indebitatus assumpsit* the contract price of that portion of the contract performed.

Parsons on Contracts, vol. 2, p. 523.
Algeo vs. Algeo, 10 Sergeant & Rawle, 235.
Hall vs. Ripley, 10 Barr, 231.
Green vs. Haley, 5 R. I., 263.
Moulton vs. Trunk, 9 Metc., 577.
Canada vs. Canada, 6 Cush., 18.
Hoagland et al. vs. Moore, 2 Blackford's Ind., p. 167.
Bannister vs. Read, 1 Gilman, 100.
Selby Hutchinson, admr., 4 Gilman, 319, 328.
Webster vs. Enfield, 5 Gilman, 298-300.
Derby et al. vs. Johnson et al., 21 Vermont, p. 18.
Wright vs. Haskell, 45 Maine, p. 492.
Leonard vs. Dyer, 26 Conn., p. 179.
Draper vs. Randolph & Co., 4 Harrington, p. 454.

II.

If one party to a special contract deviates from and varies its terms, and thereby requires more labor and expense for its fulfillment by the other than was required by the terms of the contract, the law will imply a promise on the part of the party receiving such additional labor or material, to pay so much for the same as it is reasonably worth, in the same manner and to the same extent as if no contract existed between the parties. Silence on the part of the party who performs additional work at the request of the other, will not be construed by the law as a consent to do it for nothing, but only as a consent to do it at

such rates as is paid for like labor under the contract, any more than silence on the part of the party who furnishes additional material will be construed as a consent to furnish it for nothing. The law will construe this as a consent to furnish it at the contract rate. In this case, if eight thousand cords of wood had been ordered by the United States instead of the six thousand provided by the contract, and the contractor had been silent and furnished the wood, the law and the court would have said he must receive the same compensation per cord that he was to receive by the terms of the contract.

So when the United States require us for their benefit to haul the six thousand cords from a point two miles further from the post than the contract required, the law will allow us compensation therefor at the rates that we were to receive for like work under the contract. The court below having found what that is, should have given us judgment for the same.

Dubois vs. The Delaware and Hudson Canal Co., 4 Wend., 285–291.

Dubois vs. The Delaware and Hudson Canal Co., 12 Wend., p. 334.

Dermot vs. Janes, 2 Wal., p. 9.

Cutler vs. Powell, 2 Smith's Leading Cases, p. 48.

Hollingshead vs. Mactier, 13 Wend., p. 276.

Watchman vs. Crook, 5 Gill. & J., (Md.) p. 240.

Merrill vs. The Ithaca and Oswego R. R. Co., 16 Wend., p. 590.

Laden vs. Seymour, 24 Wend., p. 60.

Green vs. Hulett, 22 Vermont, p. 188.

Snow vs. Ware, 13 Metc., p. 42.

Hutchinson vs. Cullum, 23 Ala., p. 622.

DeBoom vs. Priestly, 1 Cal., p. 206.

McCormick vs. Connelly, 2 Bay., p. 401.

Wright vs. Wright, 1 Littell, 179.

Eggleston vs. Buck, 24 Ill., 262.

Brown vs. Perry, 14 Ind., 32.
Hyde vs. Liverse, 1 Cranch C., Ct., p. 408.
Maupin vs. Pic., 2 Cranch C., Ct., p. 38.
Brackett vs. Hammond, 2 Cranch C., Ct., p. 56.
Smith vs. Smith, 1 Sandf. R., p. 208.
Grant's case, 5 N. H., p. 72.
Curtis' case, 2 N. H., p. 144.
Kingsbury's case, 1 N. H., p. 13.

"Nothing is better settled than the rule, that if there is a "benefit to the defendant and a loss to the plaintiff, conse- "quential upon and directly resulting from the defendant's "promise in behalf of the plaintiff, there is a sufficient consid- "eration moving from the plaintiff to enable the latter to main- "tain an action upon the promise to recover compensation."

Emerson vs. Slater, 22 Howard, p. 43.

Here was a benefit of the defendants. The timber was left standing near the post for its protection or future use—here was a loss to plaintiff of $5,533.00, as found and determined by the court below. Does not the law imply a promise to pay in such a case?

III.

When one party to a special contract interferes with the execution thereof by the other, in such manner that the other is hindered, delayed and put to great additional expense in the execution thereof, the law will imply a promise on the part of the party creating and causing such additional expense to pay the other party the amount of the same, and the same may be recovered in *indebitatus assumpsit*.

Merrill vs. The Ithaca and Oswego R. R. Co., 16 Wend., p. 590.
Dubois vs. The Delaware and Hudson Canal Co., 12 Wend., p. 334, and other cases cited above.
Aiken vs. Bloodgood, 12 Ala.. p. 221.

IV.

A waiver of the right to compensation for labor done and material furnished cannot be inferred from the silence alone of the party in interest, but must depend upon all the circumstances and conditions of the case; and when one party to a contract has required in the execution thereof work and labor of the value of $5,533.00 in addition to the work and labor required to execute the contract according to its terms, and in addition to the work and labor necessary to perform the same, a waiver of the right to compensation will not be inferred from the mere silence of the party performing the work. In such a palpable case the law speaks to all parties alike, and says that the party who receives must pay the reasonable value to the party who supplies.

Furnishing *additional* labor and *additional* material to that specified in a special contract stands upon different ground from furnishing *different* labor and *different* material. In the former case the party who furnishes without objection will be bound by the contract price. In the latter he is entitled to additional compensation in *indebitatus assumpsit*.

Stewart vs. Craig, 3 G. Greene's R. (Iowa,) p. 506.
2 Com. on Cont., 360.
Panell vs. Buckley, 13 Mo., p. 317.
Brown vs. Bark Laura Snow, 14 Lou. Ann., p. 861.
Smith vs. First Cong. Meetinghouse of Lowell, 8 Pick, p. 177.
Pepper vs. Burland, Peake's N. P. Cases, p. 139.
Robson vs. Godfrey, 1 Starkey's R. N. P., p. 275.

V.

The law will presume, from the fact that the parties to the contract have failed to make a settlement for the work and labor done and the material furnished, that compensation was

demanded and refused for such extra work and material, and that the party entitled to compensation, if he had demanded it, has not waived his legal right to the same.

Watson vs. Walker, 23 N. H., p. 471.
Randan vs. Barton, 4 Tex. 289.

BRIEF OF CAMBELL K. PECK, RESPONDENT.

1st. The subject matter of the contract in suit was, *inter alia*, the cutting of the grass then standing on the "Big Meadows," near the mouth of the Yellowstone River, making it into hay and transporting and delivering it at the cantonment on Tongue River, at the terms and for the prices specified in the contract. (Page 32, Record.) All this was expressed by the parties to the contract by the following words, viz.: "Said Campbell K. Peck "shall supply or cause to be supplied and delivered to the Quar- "termaster's Department, at the military station of, at, or near "the mouth of Tongue River, Montana Territory, eight "hundred tons of good merchantable hay; the deliveries to "commence on or before October 1st, 1876, and be completed "before January 31st, 1877, and be delivered at the rate of two "hundred tons or more per month, for the compensation of "thirty-four dollars and seventy-five cents per ton."

The claimant proved to the court below so conclusively that no doubt was left, that the hay referred to in the contract was to be cut on the "Big Meadow" by claimant and transported from there to the cantonment on Tongue River, and that it could be furnished from no other point or place.

This finding of the court was proper, and the evidence upon which it was based competent. It does not contradict the contract, but construes it in the light of previous and contemporaneous transactions, and from them and the contract ascertains

the subject matter of the same and the sense in which the parties used the said language.

Bromley vs. The United States, 6 Otto, pp. 173-4.
Bradley vs. The Steam Packet Co., 13 Peters, 59.
Penech vs. Dickson, 1 Mason, 11.

But in all cases of this class the purpose is the same, viz., to ascertain by this medium of proof the intention of the parties, when, without the aid of such evidence, that could not be done so as to give it a just interpretation to the contract. 13 Peters, p. 99.

On this point see also the following authorities:

Bradley vs. The Washington, Alexandria and Georgetown Steam Packet Co., 13 Peters, p. 59.
Noonan vs. Lee, 2 Blacks., p. 504.
Insurance Co. vs. Wilkinson, 13 Wallace, pp. 231-2.
Bench vs. Depeyster, 1 Starkie, 210.
Robinson vs. French, 4 East., 130.
Shelton's executor vs. Shelton, 1 Wash., p. 56.
Mechanics Bank vs. Bank of Columbia, 5 Wheat., 326.
Birkings vs. Darnell, 1 Smith's Leading Cases, pp. 463, 464.
Goldshede vs. Swan, 1 Exch., p. 154.
Bennett vs. Pierce, 28 Conn., p. 315.
Noonan vs. Lee, 2 Black, p. 499.
Myers vs. Ladd, 26 Ill., p. 415.
Cory vs. Thompson, 1 Daly N. Y., 35.
Mayor vs. Butler, 1 Barb., 325.
Waters vs. Sumners, 7 Jones (N. C.) L. 541.
Hilderbrand vs. Toyle, 20 Ohio, 147.
Morgan vs. Spangler, 14 Ohio St., p. 102.
Branhort vs. Riddle, 23 Pa. St., p. 93.
Aldridge vs. Esblemon, 46 Pa. St., p. 420
Gould vs. Lee, 55 Pa. St., p. 99.

Knights vs. New England Worsted Co., 2 Cush.(Mass.) p. 271.
Verzan vs. McGregor, 23 Cal. p. 339.
Farmers Bank vs. Winfield, 24 Wend., 419.
Poindexter vs. Cannon, 1 Deo. (N. C.) Eq. 313.
Lowry vs. Adams, 22 Vt., p. 160.
Lawrence vs. Dale, 11 Vermont, p. 549.
Rex vs. Inhabitants of Laindon, 8 T. R. 379.
Uhde vs. Waters, 3 Camp, p. 16.
Gibban vs. Young, 8 Taunt., 261.
Doe vs. Burt, 1 T. R., p. 701.
Preston vs. Merceau, 2 Bl. Rep., p. 1250.
Emmerson vs. Slater, 22 How., 28.

2nd. Such being in law the true interpretation of the respondent's contract, there is left no room for doubt that the respondent was prevented by the appellant from performing the contract, so far as it provided that he should furnish hay to the United States, and a party to a contract can have no damages for a breach which is the necessary result of his own acts.

Danley vs. Williams, 16 Wis., 581.
Parsons on Contracts, vol. 2, p. 676.
Barden vs. Barden, 5 Mass., p. 67.
Goodwin vs. Holbrook, 4 Wend., 377.
Whitney vs. Spencer, 4 Cowen, p. 39.
People vs. Bartlett, 3 Hill, p. 570.
Grandy vs. McClure, 2 Jones' Law, 142.
Waters vs. Hening, 1 Jones' Law, 46.
Chitty on Contracts, 11 ed. pp. 1087, 1091.
Alston vs. Herring, 11 Exch., 822, 830.
Planche vs. Colburn, 8 Bing., 14.
Burton vs. Pinkerton, 2 Exch., 340.
Reybold vs. Voorhees, 30 Penn. St., 116.
Dubois vs. Delaware & Hudson Canal Co., 4 Wend. 285.
Hall vs. Rupley, 10 Barr., 231.

Moulton vs. Trask, 9 Md., 577.
Hoagland vs. Moore, 2 Blackf., 167.
Derby vs. Johnson, 21 Vt., 17.
Webster vs. Enfield, 5 Gilman, 298.
Niblo vs. Bunce, 3 Abb. N. Y., 375.
Freedlander vs. Pugh, 43 Miss., 111.
Beetry vs. New Orleans, 22 La., 149.

ARGUMENT.

The case at bar does not fall within the rule in Frances case, 96 U. S., 359, for there this court found that by the terms of the contract Frances had not the right to cut on the military reservation, and that for the wood cut and delivered from the region outside the reservation he had received and accepted the contract price and given receipts in full. In this case, the right of the claimant under the contract to cut the wood at any point outside the half-mile limit from the adjutant's office is found by the court, and is unquestioned; and also the fact is found, that all said wood could have been cut on the belt of land between one-half mile and two miles and a half of the said office, and that the defendant required that all said green wood should be cut outside of a limit of three miles from the adjutant's office, and that the claimant did this, and thereby was compelled to haul 3300 cords of said wood a greater distance than required by the contract, at an expense of 1.67⅔ cents per cord, in all $5533.00; and that no settlement has been made either for the wood or this extra hauling, between the government and the claimant, and the government has made no payment and the claimant signed no receipt in full on account of this wood or extra work. So that no principle decided in the Frances case has any bearing on this case.

The salient point in this branch of the case is this: the plaintiff performed work for the defendants, at their request, of the actual value of five thousand five hundred and thirty-three dollars, all the benefit of which the defendants received, but for which they have paid nothing and refuse to pay anything. Now what general principle of law prevents a recovery by the claimant of this amount?

Can it be said the claimant was under a special contract to furnish material, 6000 cords of wood—and not to do work; and furnished the 6000 cords only, and therefore can recover no more than the contract rate?

There are two complete answers, in morals at least, and we think in law, to this question, viz.:

The contract, though in terms to furnish material, was, in fact, to perform labor. The court will take judicial notice of the fact, that the contract was to be executed in the centre of the Indian country, and that the United States alone, by right of conquest, has any wood, or real property of any description, in that country; and hence, that the obligation of the claimant under the contract was, in law, to cut the wood of the United States at a given place, and draw it not exceeding a given distance, all specified in the contract, for the compensation therein specified. Therefore, when the United States called upon the claimant to haul this wood from another point two miles further, and received said additional labor, their liability to make compensation was complete.

2nd. Again: construe the contract literally. It was to furnish the defendants 6,000 cords of wood from its own land that the claimant should be permitted to cut between a half mile and two and one-half miles from the adjutant's office.

The defendants for their own benefit choose to do what they had the right and power to do break this provision and stipulation of the contract, knowing that the claimant would thereby be compelled to haul the wood two miles and a half farther at an expense to him of five thousand five hundred and fifty three

dollars, and knowing this, received the wood under the contract. Now, here is a breach by the defendants, and damages, and the damages ascertained. Why should not the party suffering have judgment for his damages?

Does the law in such a case say that he cannot have damages because he did not inform the defendant at the time what they would be?

This would have been no advantage to the defendants. They had more knowledge than the claimant. At what period in the history of the law was it that a party receiving labor or material from another was relieved from liability to pay for the same unless notified by the party furnishing that he should demand or claim compensation?

In such a case the presumptions of the law are sufficient. The law never required notice when absolute knowledge was legally implied. And it has always been implied where more material has been furnished and more labor done than required by an existing contract.

Cannot parties who are under a written special contract make other contracts by parol, and will not the law measure these acts and liabilities outside and beyond the contract by the same standard as those of other men? Where the parties to such contract have of their own volition treated these acts as pertaining to an existing contract as done under it and limited by it, or have made settlement for the same under the contract, it is plain that they cannot afterwards come into court and ask that the law shall treat them differently and better than they have treated themselves.

But there are no facts of this kind in this case. Here labor was done for defendants of great value, not contemplated or covered by the contract, and no settlement or payment has been made on account thereof. The cases all hold that in such a case *indebitatus assumpsit* will lie.

II.

The expense that the claimant was compelled to incur at *Tongue River*, to furnish soft wood as provided by the contract was $3.08⅓ cents per cord, (p. 15, Record.) Of course the *great expense* of providing men and transportation, and marching to that point, had also to be incurred; but this has no bearing upon what transpired after they were on the ground. To cut and furnish the dry, hard wood cost $3.69⅓ cents per cord, or sixty-one cents a cord more than the wood called for by the contract, or $915.00 more in all. (Pp. 15 and 16.)

When the defendants ordered, demanded and insisted upon the delivery of this dry, hard wood, they were notified by the foreman of the claimant that it would be a great deal more expensive than to furnish the green wood called for by the contract, (p. 15, Record.) This was enough, and the law in such a case will give the claimant the difference in the cost between the article called for by the contract and the article demanded and furnished.

III.

The claimant sustained damages to the amount of thirteen hundred and sixty dollars, by the action of the defendant, preventing him from cutting and hauling said wood as provided in the contract, (p. 16, Record.)

These acts of the defendant's agents and officers were clearly a breach of the seventh stipulation of the contract.

That stipulation not only authorized him to cut at the places therein designated, but to cut all the time until that contract was filled.

Our grievance is that we were not permitted to cut where the contract provided we should, and that on account of this breach we were damaged $1,360. And with due deference to the court

below, we say that it is no answer to this that we might have cut at some other point not contemplated nor within the provisions of the contract.

ARGUMENT FOR CAMPBELL K. PECK, RESPONDENT.

1st. The law construes contracts reasonably and in the light of all the surrounding circumstances. It will not permit a contract for furnishing eight hundred tons of hay made in sight of a field of grass containing that amount, and for a compensation that will barely compensate for cutting and transporting it, to the point where it is to be delivered, and where both parties understand the same is to be cut, to be so construed that the party who is to receive the hay can afterwards go and cut this grass himself and thereby prevent the other from fulfilling his contract, and then call upon the other to answer as for a breach and pay damages estimated on the basis of the cost of hay transported from a distant continent. It cannot be said that parol evidence has been introduced and considered here to contradict or vary the terms of a written agreement.

It has been introduced and considered for the sole purpose of enabling the courts and the law to correctly interpret and construe the contract, and to interpret and construe as the parties themselves construed it when it was made. The claimant by said contract agreed to do that which was possible and feasible at a fair rate of compensation, which the defendants agreed to pay. The defendants, immediately after the execution of the contract, by their own acts, made unfeasible and impossible for the claimant to do what he had agreed to, by doing the same thing themselves that they had bound the claimant to do, and for the same purpose for which the claimant was to have done it. The defendants wanted eight hundred tons of hay for the troops at the cantonment on Tongue River. There

was one opportunity or chance, and only one, to secure the same in that country. The claimant exercised extraordinary diligence and effort to avail himself of that opportunity. Before he could do so the defendants had availed themselves of it and cut the eight hundred tons of hay for the same purpose for which they had contracted for it with the claimant.

To hold under such circumstances that the claimant must furnish the government with what it did not want, and with which it had from choice furnished itself, would be the greatest absurdity. There had been no default by claimant, and there was no sign of any default. The government needed the hay for no purpose but for the use of the troops at the cantonment on Tongue River. Shall the defendants, under such circumstances, be permitted to do that which they had agreed we should do, at the very time and place, when and where we were to do it, and for the same purpose for which we were to do it, and then charge us with a default for not doing it? No abstract principle of law, no grounds of public policy and no precedents or adjudged cases will permit such a result.

Certainly the law officers of the United States will not ask this court to hold that the defendants in this case entered into a scheme to cheat and defraud a citizen and induce him by stratagem to do that for thirty-five dollars which was worth to the government, and would cost him, one hundred and thirty-five dollars. And still one phase of the defense goes the whole length of claiming that the government officials knowingly bound this claimant by contract to sacrifice from forty to fifty thousand dollars to the United States.

The record below shows that with his boats, men and means at command, the claimant could easily have filled his contract but for the unlawful interference of the defendants.

The language and rule of this court upon this question is as follows, viz.: "Previous and contemporary transactions may be very properly taken into consideration, to ascertain the subject matter of a contract, and the sense in which the parties may

have used particular terms, but not to alter or modify the plain language which they have used."

Brawley vs. U. S., 6 Otto, pp 173-74.

"It is upon this well settled distinction that this court, while it recognizes the principle affirmed by the second instruction contained in the fifth bill of exceptions, feels bound to disapprove and overrule the first instruction in that bill. It is manifest that at the trial testimony was introduced tending to show that the contract between the defendants and the canal company, as well as that entered into between the same defendants and the plaintiff, had been modified or substituted by other and new contracts, tending too to show acts of performance by the parties to these new or modified engagements. It was certainly competent for the parties to use such evidence, and to rely upon its effect before the jury."

Prouty vs. Ruggles, 16 Peters, p. 331.

"The cases which we have thus collected together from "amongst the very many which exist, will serve to show in how "many aspects the question of the admissibility of extrinsic "evidence in relation to written contracts has been presented and "decided; and in how many forms, according to the various cir- "cumstances of the cases, the principle which we have been "considering has been applied. Sometimes it has been applied "to deeds, sometimes to wills, and sometimes to mercantile and "other contracts.

"In some cases it has been resorted to to ascertain which of "several persons was intended; in others which of several estates. "In some to ascertain the identity of the subject; in others *its* "*extent*. In some to ascertain the meaning of a term, where "it had acquired by use a particular meaning; in others to "ascertain in what sense it was used, where it admitted of sev- "eral meanings. But in all, the purpose was the same. To "ascertain by this medium or proof the *intention of the parties*,

"where, without the aid of such evidence that could not be "done, so as to give a *just* interpretation to the contract."

"Without attempting to do what others have said that they "were unable to accomplish; that is, to reconcile all the decisions "on the subject, we think that we may lay down this principle "as the just result. That in giving effect to a written con- "tract, by applying it to its subject matter, extrinsic evidence "may be admitted to prove the circumstances under which it "was made; whenever, without the aid of such evidence, such "application could not be made in the particular case."

Bradley vs. The Washington, Alexandria and Georgetown Steam Packet Co., 13 Peters, p. 59.

"Parol evidence, not inconsistent with a written instru- "ment, is admissible to apply such instrument to its subject."

Nooman vs. Lee, 2 Blacks., p. 504.

"A rule of evidence adopted by the courts as a protection "against fraud and false swearing, would, as was said in regard "to the analogous rule known as the statute of frauds, become "the instrument of the very fraud it was intended to prevent, "if there did not exist some authority to correct the universal- "ity of its application. It is upon this principle that courts of "equity proceed in giving the relief just indicated; and though "the courts, in a common law action, may be more circum- "scribed in the freedom with which they inquire into the origin "of written agreements, such an inquiry is not always forbid- "den by the mere fact that the parties' name has been signed "to the writing offered in evidence against him."

Insurance Company vs. Wilkinson, 13 Wallace, pp. 231-2.

The claimant therefore asks that the judgment of the court below, so far as it was in his favor, be affirmed. And that upon the divers causes of action set forth in his petition, which were adjudged against him by said court, that the judg-

ment of said court, so far as it pertains to them, may
reversed, and judgment rendered in his favor for the follow
additional amounts, viz.:

For hauling said wood the additional distance required by defendants, - - - - - -	$5,533
For detention of 17 teams, eight days, at $8 per day, - - - - - - - - - -	1,350
For extra labor cutting the fifteen hundred cords of hard, dry wood, - - - - - - - -	900
Loss of buildings by removal, rendered necessary by defendant's requirements to cut wood at different point from that required by contract, - - -	840
Making the aggregate additional amount for which claimant demands judgment, - -	$8,623

JOHN B. SANBORN,
Att'y for Campbell K. Pe

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In the Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 788. UNITED STATES *v.* CAMPBELL K. PECK.

No. 789. CAMPBELL K. PECK *v.* UNITED STATES.

CROSS-APPEALS FROM THE COURT OF CLAIMS. SUBMITTED UNDER RULE XX.

ARGUMENT FOR THE UNITED STATES.

MEMORANDUM.

This cause should be argued orally. Had the record been carefully examined, and the very important character of the question it presents fully understood before stipulating to submit, that stipulation would not have been signed. Should the voluminous and somewhat complicated findings create embarrassment or uncertainty upon any point, an opportunity to present it orally would be gladly embraced.

E. B. S.

In the Supreme Court of the United States.

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STATEMENT.

The contract between these parties is found at the commencement of the record (pp. 1 to 3), and of the brief for Mr. Peck (pp. 1 to 4). It is not deemed necessary to reprint it in full, for the third time, here.

It was for 800 tons of good merchantable hay and 6,000 cords (or more, if required) of good soft wood, for the use of the military station near the mouth of Tongue River, Montana, where the hay was to be delivered by Mr. Peck between October 1, 1876, and January 1, 1877, and the wood prior to June 30, 1877. (Rec. 1, arts. 1 and 2.)

By the next article the hay and wood, when delivered, were subject to inspection before acceptance. (Rec. 1, bottom.) "In case of failure on the part of said Campbell K. Peck to deliver any part of the supplies as stipulated in the contract," the United States had the right to supply the deficiency by purchase or otherwise, and hold him for the difference in cost, which could be stopped out of the amount due him. (Rec. 2, top.) The price of the hay was to be $34.75 per ton, and of the wood $8.65 per cord. (Rec. 2, fol. 4.)

The articles relating to these subjects, and the other articles of the agreement to which special attention is directed, are these, viz:

"III. That the said wood and hay, when delivered, shall be subject to inspection on behalf of the United States, as provided for by General Orders No. 87, dated Headquarters Department of Dakota, October 31st, 1873.

"IV. That in case of failure on the part of the said Campbell K. Peck, his agents, heirs, and assigns, party of the second part, to deliver any part of the supplies as stipulated by this contract, then the party of the first part shall have power to supply the deficiency, by purchase or otherwise, and the said party of the second part shall pay the difference in cost, and any money due said party of the second part may be used and applied to such payment.

"V. That payment shall be made in the customary manner, upon the delivery of the supplies, as stipulated

in article I of this agreement, provided the voucher is complete, reciting that the hay and wood have been inspected as required, and provided that the contractor is not indebted to the United States under article IV of this agreement, in the funds furnished by the government for public disbursement, and in the event of the contracting officer being without funds when payment is due, then payment shall be made as soon thereafter as funds shall be received by him for that purpose.

"VI. That the said Campbell K. Peck, party of the second part, shall receive the sum of thirty-four dollars and seventy-five cents ($34\frac{75}{100}$) for each and every ton of two thousand pounds of hay, and eight dollars and sixty-five cents ($8.65) for each and every cord of wood delivered and accepted, as stipulated in articles I and III of this agreement, and that at any time when two hundred tons of hay and one thousand cords of wood shall have been delivered, inspected, and received, a voucher may be made up and payment made thereon for one hundred tons of hay and five hundred cords of wood of the same, and thereafter for the quantity of hay and wood as delivered, until the last delivery under this agreement, when the one hundred tons of hay and five hundred cords of wood reserved shall be paid for.

"*VII. It is expressly understood that authority is granted to the party of the second part to cut* [* HAY *and wood*] *for the purpose of executing this agreement, upon any part of the military reservation at the aforesaid station* [Tongue River] *outside of a circle of one-half a mile from the adjutant's office of that said post.*

"**VIII.** That the said party of the second part shall be entitled to military protection in the execution of this

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* The words in brackets, 'hay and wood,' are not in the copy of the contract attached to the petition (Record, 2) inadvertently adopted by the court; but they are in the original at the quartermaster's office, and are in the certified copy used in evidence in the court below in this cause, as the *only* evidence of the written contract. That attached to the original petition was printed uniformly with the petition; a printed copy being signed and filed as the original petition. See the stipulation of counsel, printed as an appendix to this brief. A copy of petition, as below presented, filed herewith.

contract or agreement whenever, from the hostilities of the Indians, it may be deemed necessary by *the* post commander, whose duty it shall be to furnish protection to the extent of his power; this stipulation to give no foundation for any claim against the government for damages from Indians, or for any detriment arising from their depredations or hostilities. * * *

"X. It is further stipulated and agreed between the parties to this contract, that, upon mutual agreement, it may be changed, altered, modified, or abrogated, in whole, or in part; but no such change, alteration, modification, or abrogation shall be interpreted as entitling the party of the second part to any increased compensation over the rate of compensation specified in article VI of this agreement." (Record 2.)

"XII. That this contract or agreement is made subject to the approval of the commanding general of the Department of Dakota and of the Military Division of the Missouri." (*Ib.*)

This contract, though dated August 17, 1876, was executed ten days later at Saint Paul, Minn.

In answer to a telegram, the quartermaster at Fort Buford telegraphed that he could procure there about 200 tons of hay for Tongue River, 172 miles distant, and to have two presses and some rope sent him. He was told in reply that the contract make with the claimant superseded the necessity for the hay-presses, and they would not be sent.

August 29, 1876, the claimant forwarded from Bismarck to Fort Buford, distance 225 miles by land and 380 by the Missouri River, men, supplies, and implements to cut the hay, directing the foreman of his gangs to cut it on the "Big Meadows," about 12 miles from Fort Buford, and within the limits of that reservation, where there was, in fact, suitable grass sufficient to make 1,000 tons of hay. On that same day, August 29, 1879, acting

under previous instructions, and in ignorance of the contract with the claimant, General Hazen, commanding at Fort Buford, contracted with Leighton & Jordan for 1,000 tons of hay, and these parties begun at once to cut on the "Big Meadows," and had run the mowing-machine round nearly all of the suitable grass and had cut near 250 tons, when Mr. Peck's agent arrived there September 6, 1876. The next day the claimant's agent told General Hazen he proposed sending a train up the Yellowstone to cut whatever hay could be found, and asked for an escort to protect them from the hostile Indians with which the country was filled, but it was refused. The agent made great efforts to find fit grass, but did not succeed, and no portion of the hay specified in the contract was ever furnished. The deficiency was made up by hay bought of other parties, and about 150 tons of that cut on the Big Meadows by Leighton & Jordan were sent to Tongue River. The Quartermaster's Department charged Mr. Peck with the extra cost, and it was demanded in this suit, as a counter-claim.

The quartermaster at Fort Buford proposed to buy, if authorized to do so, the presses taken there by Mr. Peck, and to hire them if he could not obtain permission to purchase. Mr. Peck's agent was willing to sell, but refused to let them. The requested authority to buy the machines was not given, but the quartermaster used them in baling the hay cut by Leighton & Jordan and left them exposed to the weather on the river's bank, where they became dilapidated. How long they were left thus exposed is not stated.

So much for the hay and presses. Claimant's woodchoppers reached Tongue River cantonment September

19, 1876. Six thousand cords of *green* cottonwood could then have been cut in the space between half a mile and a mile and a quarter from the adjutant's quarters. The claimant could have cut this quantity conformably to his agreement at a cost of $3.08\frac{1}{3}$ per cord. There were also one thousand five hundred cords of *dry* cottonwood upon the reservation; and the quartermaster required him to cut this quantity of that character. It cost him $3.69\frac{1}{3}$ per cord to do so. The claimant's agent was told first not to cut green wood within ten miles of the adjutant's quarters; but two weeks afterward was permitted to cut it in a space from two and a half to five miles from the Ajdudant's quarters. The men and teams were idle ten days after cutting the dry wood before they began to cut the green wood within the last-designated limits. By reason of the delay, greater haulage, &c., the claimant delivered less than half the required quantity of wood that winter and completed the delivery June 28, 1877. The government refused to pay him more than the contract price for any of this wood; and from the amount due, at this rate, for the wood ($51,900) the government claimed the right to deduct, and did withhold, $40,980.63, as the difference between the cost of the hay and the contract price of it.

The questions are: (1) Was the claimant relieved from his obligation to supply the hay by the acts which prevented him from obtaining it on the Big Meadows? (2) Is he entitled to the value of the presses? (3) Is he to be paid any more than $8.65 per cord for the dry wood? and (4) is he to be compensated for not being permitted to cut the green wood outside a line drawn half a mile distant around the adjutant's quarters?

The Court of Claims found him relieved from his agreement to furnish hay, and that the deduction made from the $51,900 due on account of the wood was wrongful; but that he could recover no larger sum for the wood. Both parties appealed.

ASSIGNMENT OF ERRORS.

1. The Court of Claims erred in admitting parol evidence to vary the written contract, and in holding that the agreement was to furnish hay from the Big Meadows; and in ruling that the claimant was relieved from his obligation to deliver the hay according to the terms of his contracts, and that the deduction of the difference between the cost and contract price of the hay from the sum due for wood was unauthorized.

2. The judgment should have been that the petition be dismissed, instead of in favor of the claimant for $40,980.63 for balance due on the wood, $1,746 for the beater press, and $387 for the hay-press, aggregating $43,113.63. (Record, 34.)

3. The claimant should not have recovered for the price of the presses, which were never bought, and to buy which no authority was given.

NO. 788. UNITED STATES *v.* PECK.

BRIEF.

I.

The most important legal question, involving, too, by far the larger pecuniary amount (though that is comparatively of trifling consequence), is as to the true construction of that part of the contract relating to the hay.

The claimant contends (see his brief, p. 17; for he first argues very properly that part of the case in which he is appellant) that the contract was for cutting grass on the "Big Meadows." He there claims to have fully satisfied the court below that it could not be furnished from any other point or place. (*Ib.*)

It appears by the findings (Record, 13, bottom) that "the claimant furnished *no portion* of the hay under his said contract." * * * "A portion of the deficiency [thus arising] was purchased at Tongue River cantonment *at the contract price.*" Eleven tons were *there* bought at $50 a ton, so that only "the rest of the deficiency," amounting to 301,341 pounds, came from the Big Meadows (*Ib.*). The contract ton was 2,000 pounds (Record, 2, Art. VI). So it appears, by the findings as they read, that four-fifths of the supply *was* furnished from some other point than Big Meadows! Yes (within a single ton and two-thirds), *four-fifths of it was procured by other parties from the vicinage, so that it was delivered at the designated place at the contract price!* This appears by figures based on that part of Finding V, found near the bottom of page 13 of the record, viz: 800 tons= 1,700,000 pounds, the amount of the deficiency under contract. Eleven tons or 22,000 pounds were bought at Tongue River, at $50 per ton; 301,341 pounds, or $150\frac{2}{3}$ tons (within three pounds and a fraction), were cut on and hauled from Big Meadows; all the rest (being 1,276,659 pounds) was delivered at the cantonment *at the contract price.* That is the legal effect, and fair purport of the record findings. It is only from outside statement of counsel that I learn, to my surprise, that in fact the government did not require nor recieve anything near that amount at Tongue River Station. Such is the fact. Communicated while correcting proof.

At all events, only 151 tons were hauled from the place where Mr. Peck he claims should have cut it.

The contract, precisely as it reads, is clear, unambiguous, couched in language having no technical significance,and not requiring evidence of custom or usage to determine its meaning. It is for 800 tons of "good, merchantable hay," to be delivered at the military station near Tongue River between October 1 and January 1, at the rate of at least 200 tons a month, for $34.75 a ton of 2,000 pounds (Record 1, 2; Arts. I and VI.). Partridge *v.* Ins. Co., 15 Wall., 573; Gavinzel *v.* Crump, 22 *Id.*, 308, 319; Rogers *v.* Colt, 21 N. J. L., being 1 Zab., 704, 708; Whitehead *v.* Park, 53 Georgia, 575, 577. No. Am. Ins. Co. *v.* Throop, 22 Mich., 150, 151; Glendale Mfg. Co. *v.* Protection Ins. Co., 21 Conn., 37; Millett *v.* Marston, 62 Maine, 478.

"Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est." (Co.-Lit., 147, *a.*)

This means that the court cannot hear testimony to show that *both* parties intended something different from the clear purport of the language used. (Bailey *v.* R. R., 17 Wall., 97, 105, bottom; 2 Wharton on Ev., § 936; Hitchin *v.* Groom, 5 Com. B., 515, and authorities cited throughout this brief, and *passim.*)

"The first general maxim of interpretation is that *It is not allowable to interpret what has no need of interpretation.* [Italicized in Vattel.] When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures in order to restrict or extend it, is but an attempt to elude it. If this dangerous method be once

admitted, there will be no deed which it will not render useless.

"However luminous each clause may be—however clear and precise the terms in which the deed is couched—all this will be of no avail if it be allowed to go in quest of extraneous arguments to prove that it is not to be understood in the sense which it naturally presents.

"Those cavillers who dispute the sense of a clear and determinate article are accustomed to seek their frivolous subterfuges in the pretended intentions and views which they attribute to its author. It would be very often dangerous to enter with them into the discussion of those supposed views that are not pointed out in the piece itself.

"The following rule is better calculated to foil such cavillers, and will at once cut short all chicanery: *If he who could and ought to have explained himself clearly and fully has not done it, it is the worse for him; he cannot be allowed to introduce subsequent restrictions which he has not expressed* [originally italicized.]

"This is a maxim of the Roman law: Pactionem obscuram iis nocere in quorum fuit potestate legem apertius conscribere.

"The equity of this rule is glaringly obvious, and its necessity is not less evident." (Vattel, book 2, chap. xvii, §§ 263 and 264.)

This doctrine is more tersely stated in the passage from the opinion in Brawley *v.* United States (96 U. S., 173–4), quoted by the judge in this case. (See Record, 29, near bottom.) It is *the application of it* that seems to have been found difficult, or of which we complain.

It is not perceived that Brawley's case has any further bearing on the present, though counsel follow the example of the court in citing it. (Brief, 18 to 20.)

In no case like the present has parol testimony been received to accomplish the purpose here sought. It is only where there is an ambiguity, or it is necessary to

identify the subject to which the contract refers, that resort is had to such extrinsic matters. It is to carry out the contract, by ascertaining that which it left doubtful, that this course is adopted. It is excluded not merely if it *contradict* the agreement (as counsel rather suggest at the bottom of page 17), but if it *tends* to *vary* it.

The case cited as a precedent by the Court of Claims, and chiefly relied upon by the claimant, is that of Bradley *v.* Washington, &c., Steam Packet Co. (13 Peters, 89), which certainly goes further than any other recognized authority in its resort to extraneous evidence of the intention of parties—so far, that Thompson, Catron, and Story, JJ., could not follow the court; yet the distinction between that case and those of which it is the extreme exemplar and the one at bar is obvious, well-defined, and has long and repeatedly had the recognition of the courts and authorities. It is, that in that case it was necessary to hear testimony to learn *to what subject* the contract applied; here, it is not. Mr. Peters's head-note upon this case reads thus:

"Extrinsic evidence is not admissible to explain a patent ambiguity; that is, one apparent on the face of the instrument; but it is admissible to explain a latent ambiguity; that is, one not apparent on the face of the instrument, but one arising from extrinsic evidence; that is but to remove the ambiguity by the same kind of evidence as that by which it is created.

"Extrinsic parol evidence is admissible to give effect to a written instrument by applying it to its proper subject-matter, by proving the circumstances under which it was made, whenever, without the aid of such evidence, the application could not be made in the particular case." (13 Pet. (orig. ed.), 89.)

Judge Curtis condensed the pith of the whole matter into one line, thus:

"A contract in writing may be *applied to its proper subject-matter* by oral evidence." (13 Curtis's Condensed Decisions of the Sup. Ct., 54.)

In that instance Mr. Bradley proposed "to hire the steamboat Franklin until the Sydney is placed on the route," and the company assented to his proposition as made. It was not a general charter of the boat, to be sent whithersoever he pleased. It was for use on a particular route, and was to continue "until the Sydney is placed on *the* route." Independently of evidence *aliunde* it would be impossible to tell what act was to operate as a determination of the right to use the Franklin. It did not appear by the paper itself that "route" meant "mail-route," nor what it did mean; nor did the letter of Mr. Bradley show this or indicate what was "*the* route" intended, and the company's reply only named one of its termini. Thus, resort to parol testimony was absolutely necessary to ascertain *what* was the nature and situs of the route intended. When such testimony is received for this purpose, it appears by it that both parties understood and intended by the words "*the* route" the *mail*-route between Washington and Fredericksburg, Va.; and it was then apparent from the natural operation of the elements, of which courts take judicial notice, that such route would be closed by intensely cold weather, so that *no* boat could be "placed on the route." The shutting up of that route by frost was the act of God, which *nemini facit injuriam.* (Blyth *v.* Birmingham Water Works, 11 Exch., 781. Parsons *v.* Hardy, 14 Wend., 215, 218; Richards *v.* Gilbert, 5 Day, 415, 418.) It also was a destruction of the subject-matter of the contract, as will be hereafter noticed.

If the claimant had contracted to cut "the grass at Fort Buford" or "on my lot," &c., parol evidence might be necessary to identify the definite location of the grass or of the lot from which it is to be severed; as often happens when real estate is conveyed by its numerical or colloquial designation, as "lot No. 10 on South street,' or on a plat, &c., or "the old John Smith farm," or "the Robinson homestead." (Noonan *v.* Lee, 2 Black, 504, cited by claimant.)

I have remarked above that, in the Bradley case, both parties confessedly had the same well-known understanding of *the* route intended, and evidence was received to let the court know what that was; whereas, if the testimony in this cause could be considered here it would be found that General Card, contracting in behalf of the government, expressly and distinctly swears that he did *not* contract for the hay on the Big Meadows, nor have that or any particular place in his mind when he executed the agreement. If the court intimate aught to the contrary, this arises from its first receiving and then giving undue weight to testimony to vary the plain language of the agreement.

Mechanics' Bank *v.* Bank of Columbia (5 Wheaton, 326), cited by claimant, is another instance of the kind of ambiguity which admits parol testimony. A check, dated at the former bank, having its name in the margin, drawn on the Columbia Bank, is signed by Wm. Paton, jr., who was the cashier of the Mechanics' Bank, and parol testimony was received to show that he signed in his official capacity. I suppose if Mr. Peck's counsel should sign a note by the name "John B. Smith," it would be competent to show by parol that he was the individual making that instrument. So, in that case,

it was shown that the bank was the party really making the check, it being a signature which might indicate either an individual or a corporate liability.

But it is not worth while to examine in detail all the cases cited by the claimant. (Brief, 18, 19.) They all have this in common, that the writing expressly referred to some specific, definite thing, and the parol evidence was used only to identify that thing; like "*the* route" in Bradley's case; *e. g.*, to locate on the face of the earth "the head of Spellar's Creek," mentioned in a deed (Waters *v.* Summers, 7 Jones' Law, 541); "lots Nos. 162 and 164 Seventh avenue" (Coy *v.* Thompson, 1 Daly, 35); the property in a mill included in a bill of sale (Myers *v.* Ladd, 26 Ill., 415, and similar matters).

This also is to be noticed of many of his citations; that they relate to explanations of writings *signed by only one party;* like the check in Mechanics' Bank *v.* Bank of Columbia (5 Wheaton, 326); and to the effect of *usage* (8 Taunt., 261), or of a subsequent new oral contract, &c., &c. (22 Howard, 28, &c., &c.).

In the cause at bar we have not a writing signed by one party only; nor by individuals at liberty to contract or to change it, orally or otherwise, at pleasure; but it is a contract expressly required by law to be in writing (R. S., secs. 3744 *et seq.*) and void, if not so made (Clark *v.* United States, 95 U. S., 539), to be based upon accepted bids, tendered after due advertisement. (R. S., secs. 3709 to 3747; especially 3709, 3710, and 3744.)

Independently of the ordinary and obvious reasons which preclude a resort to oral testimony to vary a written contract, the spirit and purport of these statutory enactments forbid it as to government contracts.

Between individuals (as, for instance, between Mr.

Bradley and the ferry company) only the persons executing the agreement are usually interested, and they may change the terms at pleasure. It is to be carried into effect, ordinarily, under the eye of the party. A quartermaster contracts only as a *subordinate* agent, in behalf of the public; and, as in the present instance, the supplies are to be delivered hundreds or thousands of miles from his headquarters. The inspectors at the point of delivery can have no guide for their action but the writing to which the names of the contractor & the quartermaster are affixed. The filing of the contract with the Comptroller and of a copy in the Returns' office (as required by R. S., secs. 3743 and 3744) will be of no avail if the writings thus filed do not indicate the nature of the government's obligation, and that is left to be ascertained by the conversation of some subordinate out on the frontier. The legislative and departmental effort has been to make the liability of the government appear and depend not merely upon written instruments, but upon such documents filed as matter of record. If the ruling now under debate is sustained, these efforts are futile, and we are all at sea as to what any contract with the government really means.

Art. XII (record, 2–3) makes this contract "subject to the approval of the commanding general of the Department of Dakota and of the military division of the Missouri," which it received (*Ib.*). Each of these high functionaries approved the written contract transmitted to them for that purpose, just as it read, without any knowledge of the conversations between Mr. Peck and General Card upon the subject, or any intimation of a condition or understanding limiting the hay to be delivered to such as might be cut on Big Meadows. If Gen-

eral Card could have made a contract thus limited, it is safe to say that it would not have received the approval of his superior officers.

Until it was thus approved it was no contract. It becomes effective only by approval, and it is only that which is approved which makes a part of the contract. (Hawkins *v.* United States, 96 U. S., 689, 691, 693–'4, *et seq.*)

As to this matter, Roberts thus expresses himself: "The statute of the 29 Car. II has *enhanced* the duty of caution in admitting verbal testimony to add to or alter written instruments in the cases falling within its provisions;" adding in a foot-note, "The authorities for this observation are innumerable. I shall set down the following as sufficient for my own and the reader's purpose." (Preston *v.* Merceau, 2 W. Blackst., 1249; Nicholls *v.* Osborn, 2 P. Wms., 420; Chester *v.* Chester, 3 P. Wms., 51; Hare *v.* Shearwood, 1 Ves., jr.,241.) The text then proceeds: "And it should seem that if at the common law, where writing was not necessary to the validity or *proof* [his italics] of the contract, courts were so cautious of permitting parol evidence to vary or control its import, a more abundant reason for the same caution arises out of the statute of frauds, which has rendered certain contracts remediless at law without writing." (Roberts on Frauds, 10, and note 3.)

The rule excluding parol testimony has always been enforced with additional strictness in cases where the statute requires the contract to be in writing, instead of leaving it optional with the parties to adopt that form. How strict has been its application in such cases, see Grafton *v.* Cummings, 99 U. S., 100.

Upon this point Judge Taylor says: "§ 1036. Independent, too, of all considerations of convenience, the legislature has, by positive enactment, adopted the same rule in several cases as an arbitrary and absolute one; and by requiring certain dispositions of property and other transactions to be evidenced by writing—as, for instance, wills, contracts within the statute of frauds, and the like—has rigidly excluded all parol testimony tending to vary the terms contained in the written instrument. But though *the statutory rule will, perhaps, be more strictly enforced than that which rests on the common law* alone—because, in the former case, *to relax the rule in any degree is*, to the like extent, *to repeal the particular act which renders the writing necessary*—yet, at the present day, it seems to be admitted as indisputable law that the term 'written instrument,' as used in the rule, includes not only records, deeds, wills, and other instruments required by the statute or common law to be in writing, but every document which contains the terms of a contract between different parties, and is designed to be the repository and evidence of their final intentions." (2 Taylor on Ev., 6th ed., 987—'8, § 1036.) In the succeeding section (1037) he proceeds to observe that "To other less formal documents the rule does not extend," &c. (See also § 1046.)

It is another element, then, distinguishing this case from Bradley *v.* Steam Packet Company, that here we have the act of a public agent, required by law to put into writing the precise engagement he makes in behalf of the government, and the other was a brief, hasty correspondence between gentlemen who might have contracted verbally had it been equally convenient.

Independently of statute, there is a well-defined and obviously just distinction in the application of parol

testimony of extrinsic circumstances between contracts made by "casual" or by "predetermined" documents, as Mr. Bentham designates them; *e. g.*, an agreement deducible from a chance correspondence, adopted as the easiest mode of communicating a want, as in the Bradley case, is more open to modification by external proof than such an instrument as is the basis of the present claim. 2 Wharton on Ev., § 920, which reads thus:

"§ 920. Parol evidence, in obedience to a rule which has been already frequently stated, cannot be received to vary the terms of a document. It is important, however, in determining the force of this rule, to distinguish between documents which are uttered dispositively, *i. e.*, for the purpose of disposing of rights; and those uttered non-dispositively, *i. e.*, not for the purpose of disposing of rights. A non dispositive, or, to adopt Mr. Bentham's term, a 'casual' document, is more open to parol variation than is a document which is dispositive, or, as Mr. Bentham calls it, 'predetermined.' A casual or non-dispositive document (*e. g.*, a letter or memorandum thrown off hurriedly in the ease and carelessness of familiar intercourse, without intending to institute a contract, and without reference to the litigation into which it is afterwards pressed) is peculiarly dependent upon extraneous circumstances; is often inexplicable unless such circumstances are put in evidence; and employs language which, so far from being made up of phrases selected for their conventional business and legal limitations, is marked by the writer's idiosyncrasies, and sometimes comprises words peculiar to the writer himself. But whether such documents are informally or formally constituted, they agree in this, that, so far as concerns the parties to the case in which they are offered, they were not prepared for the purpose of disposing of the rights of the party from whom they emanate. Dispositive documents, on the other hand, are deliberately prepared, and are usually couched in words which are selected for the purpose, because they have a settled

legal or business meaning. Such documents are meant to bind the party uttering them in both his statements of fact and his engagements of future action, and they are usually accepted by the other contracting party (or in case of wills, by parties interested), not in any occult sense, requiring explanation or correction, but according to the legal and business meaning of the terms. It stands to reason, therefore, that parol evidence is not as a rule to be received to vary the terms of documents so prepared and so accepted, though it is otherwise when such documents are offered, not dispositively, between the parties, but non-contractually, as to strangers. So far as concerns the parties or privies to a dispositive document, valid in itself, its terms cannot ordinarily be varied by parol."

General Card would have had no right to contract for any particular herd of cattle, or drove of hogs, or lot of hay, for the sustenance of government troops or animals. As he could not advertise for any special lot (the very idea is an absurdity), he could not contract for it, since the contract is based upon and results from the accepted proposal. He must advertise for, contract for, and receive *any* beef, pork, or hay that may be needed, prescribing for such quality and inspection as he thinks necessary, but not that the beef shall be from the cattle of A., or the pork from the hogs of B., or the hay from the grass on any particular lot.

Mr. Bradley could hire of anybody any boat he liked, for such period as he wished, upon any terms which suited. General Card was bound to accept the proposal of the lowest bidder. It appears that several contractors made proposals "for supplying hay and wood at Tongue River cantonment," and he accepted the claimant's bid as most favorable. That acceptance was by telegraph from Saint Paul to Keokuk, claimant's resi-

dence, from whence he had forwarded his proposals. (Record, 11, middle.) *This proposal and acceptance constituted a contract.* (Garfielde *v.* United States, 93 U. S., 242, and authorities *passim.*) Yet in these writings was no hint that the hay was to be gathered at any particular spot. It is evident that neither Mr. Peck nor any of his competitors were invited to bid upon any such terms. To say that this was an element of his contract is unfair toward competing bidders.

It may well be that, owning a quantity of grass, the government may advertise for proposals to have it cut, and accept the lowest bid made for this purpose. It must distinctly appear, however, that this labor is the precise thing for which proposals are solicited; otherwise, the purpose of the law requiring advertisements, &c., is defeated, and bidders are misled and unfairly treated.

This, however, was not a contract for grass, but for hay. "If they [the contractors] could have bought the hay from another party and delivered it, would they not have fulfilled their contract? It was clearly a contract for the sale and delivery of hay, and not for cutting grass and hauling it into the fort." (United States *v.* McKee, 97 U. S., 235.)

It may be true that both General Card and Mr. Peck *supposed* or *expected* that he might *probably* obtain this hay from the vicinage of the place of delivery, or near Fort Buford; but this *expectation*, even if indulged by both parties, would make no part of the contract, if only verbally expressed, or silently entertained. The contractor would still be at liberty to procure it wheresoever he pleased, changing his original purpose to secure it at

a particular point, and the other party would be bound to accept it, if in quality conformable to the terms of the contract. Mr. Peck might be *induced* to contract, by his conviction that he could find the grass from which to make the hay somewhere along the banks of the Yellowstone; but the *inducement* to a contract is distinct from its *consideration*. (Philpot *v.* Gruniger, 14 Wallace, 570; Thomas *v.* Thomas, 2 Q. B., 949, being 2 Ad. & El., N. S., 859; Fitch *v.* Snedaker, 38 N. Y., 252, top.) And the *expectation* of parties to a contract is no part of it. The failure to appreciate and make the proper application of this principle is a fundamental error of law, even if the fact be assumed as proved that it was *expected* that this hay was to be cut on the Big Meadows; but if the expectation of the parties is no part of, and cannot affect, the contract, then it should not be given in evidence.

In one of the legal-tender cases it was said: "The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but *neither the expectation of one party* to the contract respecting its fruits *nor the anticipation of the other* constitutes its obligation. *There is a well recognized distinction between the expectation of the parties to a contract and the duty imposed by it.* Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow." (Knox *v.* Lee, Legal Tender Cases, 12 Wallace, 548.) This language is quoted and approved in Maryland *v.* Railroad Company, 22 Wallace, 112, where there is also this quotation from the opinion of Lord Denman, C. J., in Aspdin *v.* Austin, 5 Ad. & El., N. S., Q. B., 684: "Where parties have entered into a written en-

gagement with express stipulations, it is manifestly not desirable to extend them by any implications. *The presumption is that having expressed some, they have expressed* ALL *the conditions* by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the *supposition* that the business would in fact be carried on, and the service in fact continued, during the three years, *and yet neither party might be willing to bind themselves to that effect;* and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they either purposely or unintentionally have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is of course quite unauthorized, as well as liable to great practical injustice in the application." (See also the next case in the same volume, Dunn *v.* Sayles, 5 Ad. & El., N. S., Q. B., 685, 692.) Upon this subject the supreme court of Pennsylvania thus expressed its views: "This brings us at once to inquire what the stipulations of the contract were. It matters not what, in our opinion, would have been a reasonable arrangement, *nor what it may be supposed the parties anticipated*, nor whether the plaintiff's early discharge was a hardship to him. The true question is, *what is the contract?* To what did the parties bind each other? We are not at liberty to make contracts for them, *or to add any stipulations which they have not seen fit to incorporate. We*

cannot give to a mere expectation the sanction or the binding force of a covenant. No doubt, in construing any written instrument, the court may take into view the situation of the parties when it was made, and the objects they must then have had in view; but still, when a breach of a written contract is alleged, *the language of the instrument must determine to what its parties have bound themselves.*" (Coffin *v.* Landis, 46 Penn. St. (10 Wright), 431.)

To the same effect, see Johnson v. Pierce, 16 Ohio St., 478, top, and 2 Wharton on Ev., § 936, cited infra.

For this reason one cannot testify to his *understanding* of his contract. (McCormick *v.* Huse, 66 Ill., 319.)

A French commentator thus presents the same idea: "La cause [consideration] est ce qui détermine l'engagement que prend une partie dans une contrat; *il ne faut pas la confondre avec la cause implicite du contrat, autrement le motif qui porte à contracter.* La cause de l'engagement d'une partie est le fait ou la promesse de l'autre partie; elle peut aussi consister dans une pure liberalité de la part de l'une des parties; ainsi, lorsque je m'oblige a payer mille francs à Paul, pour tels services que son père m'a rendus, la cause determinante du contrat, ce sont les services qui m'ont été rendus; le motif qui m'a porté à contracter, c'est le désir de m'acquitter envers lui des services de son pére; si celui-ci ne m'a jamais rendu les services dont il a été parlé dans l'acte, le contract est sans cause. Je m'oblige à donner mille francs à Paul pour qu'il suive une affaire pendente devant le tribunal de la Seine; la cause determinante est la promesse de Paul qu'il suivra mon affaire; si elle est jugée irrévocablement au moment où nous avons

stipulé, le contrat est sans cause."—Rogron, Codes Français Expliqués, &c. (Paris, A. D. 1836), 209.

This last quotation suggests this hypothesis: Conceding, for the argument's sake, if you please, that both parties *expected* the hay to be obtained from the Big Meadows, or thought it probable such would be the case, *did the procurement of it there so enter into*, and become a vital part of, *the contract that it would have been null and void if the Indians had burned over those meadows and destroyed the grass thereon* (as they did on other neighboring tracts that would otherwise have been available to the claimant—Record 19, Finding XI—and as happened in McKee's case, 97 U. S., 234, top) *prior to the moment when the stipulations of this contract received the assent of the parties?*

In other words, was the grass on Big Meadows the subject of this contract, so that its destruction, prior to the execution of the papers, would relieve the contractor from his engagement? Or, in the before quoted language of McKee's case, 97 U. S., 235, "if he could have bought the hay from another party and delivered it, would not that have fulfilled his contract?

COULD THE GOVERNMENT HAVE REFUSED HAY OF GOOD QUALITY, BECAUSE NOT CUT FROM BIG MEADOWS? It certainly had that right, if that particular patch of grass was the real subject-matter of this contract.

It is *only* to apply the contract to its proper subject-matter (except in cases of fraud or usage) that oral evidence is ever admitted where the suit at law is upon a written instrument. (Bradley *v.* Washington, &c., Steam Packet Co., 13 Curtis's Decisions of the Supreme Court, 54, and cases generally.) For that purpose only

then, could it be received in this case. If the grass at Big Meadows was *not* the subject-matter of this contract, then the parol evidence was wrongly heard and considered. If it *was* the subject-matter, then the government could have properly refused to accept any cut elsewhere; which proposition seems to me, in view of the circumstances, the *reductio ad absurdum*.

The case of Bradley *v.* Steam Packet Co. (13 Peters, 89) is constantly referred to by me because it is the professed basis of the action of the court below, and the chief reliance of the claimant here. If that decision does not authorize the course adopted in this case, it is confessedly wrong. Referring again to it, then, let me say that, not only would the destruction of the Franklin at the moment the packet company accepted his offer, or prior thereto, have relieved Mr. Bradley from paying the per diem rate for her, but the corporation could have prevented him from using her anywhere else than on "the route" for which the Sydney was intended, and have subjected him to a further responsibility had he so used her. The destruction of "the route" by ice affected the subject-matter of the contract just the same as if the boat had been destroyed by fire. See cases before cited. In short, that, like all the rest of the cases of which it is the leader, related to a specific chattel, intended for a special use; that use was indicated by words applicable alike to a thousand different subjects, viz, "the route"; and testimony was received to identify the particular subject intended by the parties by that expression. Another similar case cited by the claimant was a written submission of "all matters of controversy between us subsisting now in suit," and it was shown by parol that the *only* action between these

parties was one in which the defendant appeared as administratrix. The court held this evidence admissible, because "no one can have any knowledge of the controversy without referring to the suit, and on referring to that it is at once seen that it is a controversy between the plaintiff and the defendant in her representative capacity." (Bennett *v.* Pierce, 28 Conn., 316.)

As this court said in Maryland *v.* Railroad Company (22 Wall., 113): "Ordinarily a reference to what are called 'surrounding circumstances' is allowed for the purpose of ascertaining the subject-matter of a contract, or for explaining the terms used, *not for the purpose of adding a new and distinct undertaking.*" Van Bokkelin v. Taylor, 62 N. Y., 105; Cease v. Cockle, 76 Ill., 484.

The application to the subject-matter has always been where the contract is with reference to *some specific article*, or where ambiguous or technical terms are employed, like Birch *v.* Depeyster, 1 Starkie, 210.

But where the language indicates a specific lot of merchandise, parol evidence is not admissible to show that the contract was intended to be general. Hough v. Peoples' Ins. Co., 36 Md., 398, 427-8.

Nor can it be received to show that a contract to furnish milk for a hotel was intended to continue for a specific term, no time for its continuance being mentioned. Irish v. Dean, 39 Wisc., 562.

In no action upon a contract, even between individuals, *has it ever been held that a written executory agreement for merchandise generally*—as for so much wood or hay--*could be shown by parol to relate to a given article, or to a specific lot of such merchandise.* The contrary has been frequently decided.

☞This assertion is positively made after an exhaustive examination of *every* case cited by the text books upon this subject and under this title in the United States digests.☜

In a suit upon a contract for "Ware potatoes" it was held not permissible to show that the plaintiff had, in fact, contracted for a particular *kind* of Ware potatoes, viz, "Regent's Wares," while those offered to him by the defendant were of an inferior kind, viz, "Kidney Wares." (Smith *v.* Jeffreyes, 15 Mees. & Wels., 561.)

Under a written agreement for "one hundred merchantable fat hogs, to be as follows," specifying weight and time and place of delivery, it was "held, 1. The contract on its face was not of specific, but of indeterminate chattels; 2. In an action for refusing to receive the hogs tendered in performance of the contract, parol evidence offered for the purpose of showing that certain hogs owned by the plaintiff at the date of the contract formed part of the hundred head contracted for, was properly rejected." (Johnson *v.* Pierce, 16 Ohio State, 472.) After a summary of the facts and a statement of the law, the court, near the close of the opinion, use this language: "The most that can be said of it is, that it [the excluded testimony] would have shown that the parties *expected* the hogs referred to to be used in the performance of the contract. If this were so, it is equally true that *they abstained from making what they expected a part of their contract.*" (*Id.*, 478, top, A. D. 1866.)

The same court had previously held, in 1860, that under an agreement to ship hogs to New York, it was not competent to prove that one of two available methods of transportation was agreed upon. The court say, "We think there is a misapprehension [on the part of

the plaintiffs] as to the meaning of a latent ambiguity. 'A latent ambiguity is where you show that words apply equally to two different things or subject-matters. Smith *v.* Jeffreyes, 15 M. & W, 581.' The things must be different, and the parties must, on account of that difference, have intended one and not the other. It is not a case of latent ambiguity where, *according to the language of the contract*, the parties may have intended either of the two things in which the difference is claimed to exist." Webster *v.* Paul, 10 Ohio State, 534, middle, where the opinion proceeds to discuss the case cited from 15 Meeson and Welsby.

In Johnson *v.* Pierce (16 Ohio St., 472) cited supra, the excluded testimony was to prove that the contract related in fact to a particular lot of hogs owned by Johnson. In an Iowa case, upon a like contract, a party desired to prove that he did *not* own any hogs, but that he would have to buy them to fill the contract; but that court took the same view, and excluded the testimony, holding the contract was for so many hogs, and it was immaterial from what source they were procured to meet its requirements. (Willmering *v.* McGaughey, 30 Iowa, 205.) The special point in this last case, however, was that the testimony of stock dealers could not be received to establish the *legal effect* of the contract, as to the time and conditions of delivery. As to this, the Vermont court said, "Parol testimony is no more admissible to vary the clear and settled legal meaning and effect of a contract, than it is to vary its terms.' (Brandon M'f'g Company *v.* Moore, 48 Vermont, 327; 36 Md., 427–8; 39 Wisc., 562.)

The supreme court of New Jersey held that, under a written agreement to take all the barytes the plaintiff

would deliver at Jersey City, "parol evidence could not be given to show that any particular *lot* or quality of barytes was intended." (Fitch *v.* Archibald, 29 N. J., 5 Dutcher, 160.) The opinion of the court thus declares the law:

"But did the agreement require the delivery of a merchantable article? Is that its import as it stands? The writing may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties. No other evidence of the language employed by the parties than that used in the instrument is receivable. (1 Greenleaf, 277; 2 Cowen & Hill's Notes to Phillips's Ev., note 263 to page 293.)

"Where the writing does not clearly identify the subject of the agreement, surrounding circumstances may be resorted to to show what the parties referred to in the agreement; but *where the contract is executory, requiring the delivery*, not of a certain article capable of identification from all others of the same kind, but *of a certain or uncertain quantity of a known article of merchandise, parol evidence is not admissible to show that this quantity is to be taken from a larger quantity of the article of a certain kind, the property of a certain person, or of a particular quality.* To secure such evidence, or permit its application for such a purpose, would be to alter the contract in a most material point."—Fitch *v.* Archibald, 29 N. J., Law, (5 Dutcher), 164.

In Etheridge *v.* Palin, 72 N. C., 213, testimony was excluded that was offered to show that the fishing implements sold were not in so good order as they were represented—the action being upon the contract, and not for deceit. Pearson, C. J., delivered the opinion.

Under a contract for "all the white oak timber large enough to make cross-ties" upon certain land, it was held inadmissible to prove that it was not intended to include and sell some white oak timber on the land much

larger than is ever used to make railroad cross-ties." Tatman *v.* Barrett, 3 Houston (Del.), 226.

Where the plaintiffs declared upon a memorandum, signed by the other party only, which stated that the signers had bought "2,000 bags Peruvian rice, of 100 pounds each, more or less, *as per sample*, and the rice warranted sound, at the price of 12½ cents per pound, to be received on the wharf as fast as the weather permits *the vessel* to discharge," &c., and averred "that the plaintiffs delivered to the defendants, *from on board the vessel referred to in said contract*," the said rice, the supreme court of California held that the plaintiffs could only prevail by proving a delivery of *sound* rice, and that they could not show a delivery of some particular cargo, alleged to be the rice intended by the contract. In giving the opinion, that court says:

"The district court was probably led into error on account of what is alleged to be a delivery of the whole amount sold, in the shape of a particular cargo, and doubtless construed it into the purchase of a special cargo; in which case the court would have been right in allowing the action to proceed on the contract, turning the defendants round to their action on the warranty, or allowing them in the same action to recoup the damages under proper averments in the pleadings.

"But *the contract here declared on is not of that class. It is simply for the sale and delivery of so much sound rice, without specifying any particular rice*, or any particular cargo; and *in the absence of any ambiguity on the face of the contract, parol evidence was inadmissible for the purpose of varying its terms*, or of altering the character of the liability which it created."—(Ruiz *v.* Norton, 4 California, 355, 357–'8.)

These cases go to the extent that it is not permitted to show that both parties *intended* (not merely *expected*) cer-

tain specific articles to be subsequently delivered in fulfillment of a contract for merchandise generally. To the same effect, though not founded upon precisely similar facts, are the expressions in very many other cases.

"Where persons sign a written agreement upon a subject, obnoxious or not obnoxious to the statute that has been so particularly referred to [of frauds], and there has been no circumvention, no fraud, nor (in the sense in which the term 'mistake' must be considered as used for this purpose) mistake, the written agreement binds at law and in equity—[MEMO. This was a chancery appeal]—according to its terms, *although verbally a provision was agreed to which has not been inserted in the document;* subject to this, that either of the parties sued in equity upon it may, perhaps, be entitled in general to ask the court to be neutral, unless the plaintiff will consent to the performance of the omitted term." (Martin *v.* Pycroft, 2 De Gex, Mac. & Gor., *795, per Bruce, L. J.)

"The contract must be read according to what is written by the parties, for it is a well-known principle of law that a written contract cannot be altered by parol. *If A and B make a contract in writing, evidence is not admissible to show that A meant something different from what is stated in the contract itself, and that B at the time assented to it.* If that sort of evidence were admitted, *every written document would be at the mercy of witnesses that might be called to swear anything.*"—(Nichols *v.* Godts, 10 Exch. (H. & G.), *194, per Pollock, C. B.)

A fortiori, the *understanding* of a party is inadmissible.—(McCormick *v.* Huse, 66 Ill., 319.)

I have been citing and considering cases upon contracts purporting to sell given articles of common mer-

chandise. It is proper to observe that such is the present case. The agreement is for "800 tons of good, *merchantable* hay." (Record, 1; art. 1.) If, as is now claimed, it meant a particular lot of grass, known to both parties, near a fort, to be cut and made under military protection, the language was most unfortunately chosen. If such were the article bargained for, it would have to be accepted, whether good and merchantable or bad and unsalable. Merchantable means vendible, such as is currently sold for a given purpose. As the Delaware court say, in a case before cited, "Questions of *interpretation*, as well as *construction*, of written instruments are for the court alone." (Tatman *v.* Barrett, 3 Houston, 232, middle.) Applying to this contract the just definition of "800 tons of good, *merchantable* hay," and we see it means that quantity of the article fit for sale and purchase in the open market as "good" hay. It clearly designates a general article of merchandise, and not a specific lot.

Except for the immaterial omission of the opening and concluding sentences, the following is the entire opinion of Erle, C. J., in Hotson *v.* Browne, 9 C. B., New Series, *447.

"The action was brought upon a contract signed by the defendant, to pay a given sum for the insertion of certain advertisements in a publication called Hotson's Local Time Tables. We consider the point which is referred for our decision to be, whether evidence of a conversation which is alleged to have taken place at the time the contract was entered into was admissible to vary the effect of the promise the defendant signed. It was contended before us that the defendant was induced to enter into the contract by the fraud of the plaintiff's agent. *If that had been the issue*, we see no reason for doubting that the evidence tendered would have been admissible. But, as the learned counsel for the plaintiff

denies that that was the issue, and the judge's notes throw no light upon it, we are of opinion that the question of fraud is not properly before us. Then, it was contended that the evidence was admissible on the ground that the construction of the contract was for the jury. We think not. We think that, *if the promise was adopted in terms by the plaintiff, the evidence offered of contemporaneous conversation to vary the effect of the promise was not admissible* or proper for the consideration of the jury."

In the cause under argument, as in that just cited, the plaintiff denies that the issue was the existence of *fraud*. He must do so, for to allege it would oust the jurisdiction of the court. (Gibbons *v.* United States, 8 Wallace, 269.)

"When parol evidence is admitted, which is admissible only for the purpose of proving fraud in a written agreement, it cannot legally be used to control or vary the terms of such agreement." (Leonard *v.* Smith, 11 Metcalf, 330.)

There was no fraud or improper practice upon the part of the agents of the government. "General Card had never been in the Yellowstone region." (Record, 32., finding XIII.) He did not know how much grass there was at Big Meadows, but *supposed* there was a large quantity. (*Ib.*) In August, General Card had solicited proposals, and that of the defendant was accepted August 22, and had necessarily been received that day or at an earlier date; probably on or before August 17, 1876, when the contract bears date. It was executed August 26 or 27; and, at that interview, for the first time, the claimant tells General Card he will send men and tools to Big Meadows, to cut the grass known to be there. The claimant had no personal knowledge of the condition of the Yellowstone, but *sup-*

posed it to be as navigable as the Upper Missouri, and that he would have plenty of time to transport the hay by steamer. General Card made no comment upon or reply to this suggestion, and gave him no assurance of or agreement for water-transportation; nor did he communicate to him his (General C.'s) own idea, that the river was not then navigable above Glendive. (Record, 11, 12; finding III.) *If he had done so, he would have given him an erroneous impression, for it was in fact then navigable to Powder River*, and so continued for three weeks later. (Record, 10, close of first finding.)

We find then that, at or after the execution of the formal contract, based upon a previous offer and acceptance, Mr. Peck first expressed his expectation of finding grass at Big Meadow. Yet it was not his idea that he was entitled to get it there, or that it was essential for him to do so; for his agent, upon his arrival at Fort Buford, told General Hazen "that the claimant held a contract from General Card for furnishing hay to that cantonment [at Tongue River], which had been made *with the understanding that they could* EITHER *get hay on the Yellowstone*, NEAR THE POST [Big Meadows is about 160 miles from 'the post'], OR cut it below *at* SOME *point*, and ship it on boats; and that he [the agent] *expected* to cut it from the Big Meadows, where was the only hay known to him from which the contract could be filled." (Record, 12, 13.) Art. VII of the contract really put in evidence stipulates for the right to cut hay and wood *at* the Tongue River Station; or, as the agent expressed it, "near the post." The agent made no *claim* to this particular grass at Big Meadows, beyond this expression of his disappointment and perplexity. Record, 21; finding XVI.) On the contrary, he

expressed his intention to look elsewhere for grass (*ib.*), and accordingly "made great efforts to find grass fit for hay," as stated in the fourth finding, near the middle of page 13 of the record. Evidently he was not informed and did not believe that the performance of the contract was dependent upon the existence of sufficient grass at Big Meadows, or upon his ability to cut it there.

There was other grass that was cut and sent to Tongue River, as already noticed. That cut from the upland prairie of the Missouri was thinner and not so profitable to cut. (Record, 19; finding XI; and 25, folio 43.)

Article VII, as actually written and entered into by the parties (see ante, p. 3, and note), secured to the claimant the right to cut *hay* and wood at Tongue River Station. This absolutely negatives the idea that the subject-matter was particular grass at Big Meadows, and renders it extremely improbable that the parties contracted with reference to the non-existence of grass elsewhere.

The omission of the words "hay and wood" from the contract annexed to the petition (of which a printed copy was adopted and signed and filed as the original), was not not noticed by me until the proof of my argument came from the printer. As an appendix to this argument, I have printed the stipulation of counsel (which I presume will also be distributed with the Record), showing how this Article should read. The Court of Claims rendered their judgment upon a different contract, in this respect, from the one actually made. Before discovering the error, I had made some suggestions upon the contract without the words "hay and wood" in this article, and will now let them stand (*infra*) as show-

ing my reasons for thinking the judgment wrong, even upon the case as originally presented. Indeed, I do not say the omissson was *very* material; but whatever effect the words have is in contradiction of the claimant's position.

The real great difficulty was *the low stage of water in the Yellowstone.* [Record, 10; finding I; 12, 13, finding IV; and 25, folio 42.] The cost of cutting and transportation would have been four times the contract-price. See General Hazen's letter. (Record, 22.) *Nor was the claimant prepared to transport the hay from any distant point otherwise than by water.*

In an earlier letter, General Hazen stated what was the trouble with Mr. Peck, who had no personal knowledge of that country. Like his predecessors, he did not understand the situation. As General Hazen wrote, under date of September 4: "Two out of the last three contracts made for hay by the Quartermaster's Department at this post failed, from the fact that *the great difficulties of getting hay in this country were not understood by the contracting parties.*" (Record, 20, bottom.)

No doubt General Hazen also had a just appreciation of the matter when he wrote, October 12, 1876 (Record, 22), that the claimants did not expect to put in the hay, after they found they must transport it by wagon, at enormous cost, but relied upon a profit from delivery of the wood, which could be cut near the point of delivery.

The hay was not transported from "another continent," but from the very place where plaintiff claims he should have cut it, and by the means of carriage he would have been obliged to employ.

No argument can be derived from the assumed folly of Mr. Peck entering into an agreement containing such elements of uncertainty and risk, without sufficient knowledge of the country, &c.;—for that very thing he did. The court will not find, as claimant alleged in his petition, that the state of the Yellowstone was a part of the agreement; yet upon this unknown circumstance the profit or loss accruing through his contract wholly depended, if the grass was to be cut near its mouth. If the water was too low, he could not transport it from Big Meadows to Tongue River, except at enormous cost. He could not have done it so cheaply as the government did, if at all, for he was not provided with teams for that purpose.

"The folly or the wisdom of the contract, as one or another construction might be placed upon its terms, would be a dangerous element to introduce into the interpretation of contracts. It suffices for this case that *whatever were the views of the parties* they have expressed their agreement in terms too plain to be doubted or misunderstood. (Lowber *v.* Le Roy, 2 Sandford, 220.)

There is no more reason, then, for deeming the claimant's expectation of cutting the grass at Big Meadows an element of this contract than there is his expectation that there would be more water in the Yellowstone than actually proved to be fact. He mentioned both these matters to General Card, who made no response at all indicative of any willingness to treat them as conditions attached to the fulfilment of the contract, though the claimant avers that water transportation was guaranteed to him. (Petition, Record 4; middle, specification 6.) Nor is it at all probable that the claimant would *then* have been willing to insert such a clause, making his right to furnish the hay

dependent upon his procuring it at any given spot. He sought for it elsewhere than at Big Meadows; had he found it and cut it elsewhere, the government could not have rejected it for that reason, but it could have been properly delivered by him "according to the terms of the written contract. That he might properly have done so under that contract is admitted by the offer to prove a verbal contract which would restrict that right. To allow this would, we think, in the language before used, vary and limit the written contract between the parties." (Webster *v.* Paul, 10 Ohio State, 535.)

In short, we are all at sea, if we go into a consideration of the methods by which he hoped profitably to fulfill his contract, or (as this court expressed it) into "the expectation of results." (12 Wallace, 548.)

We have a plain, written contract between the government and Mr. Peck for a specified quantity of ordinary merchandise, to be delivered at a designated point, within a limited time. The attempt is to ingraft an important qualification thereupon, not from anything actually proposed or assented to by either party, but by an inference from a state of things not known to them both when the writing was executed; and it is accompanied with a recital of what the contractor, his agent, General Card, General Hazen, and other persons said subsequently, and not at all within the possible knowledge of those whose approval give validity to the contract. That which the United States agreed to was that to which all these officers assented, and that only. Precisely that was what the government said.

"The principle on which the law starts out is one almost too obvious to need stating, being that on which we daily act in all the transactions of life; namely, that

men are to be taken to mean what they say. The next step is of a somewhat more artificial character, but equally founded in reason. It is that men are taken to mean what they have chosen to say deliberately *and in a permanent form*, rather than what they may have said in a hasty and less considered discourse. Hence the general rule, that evidence is not admissible to contradict the terms of a written document." (Pollock on Contracts, 410.)

More liberality is shown in construing a will, which is the act of one party, oftentimes hastily drawn by unlettered men, than of a bilateral contract, in which the parties negotiate at arm's length; yet, in the matter of construing the singular phraseology of a will, referring to "godly people," and to "godly preachers of Christ's holy gospel," Tindal, C. J., used such appropriate language upon this general subject that I trust I may be pardoned for quoting it *in extenso* in concluding this branch, by far the most important, of my argument. My impression of the importance of the inquiry involved in the general administration of the law, and especially in government causes, where the agreements are made by those stimulated by the zeal of private gain on the one side, and by those merely performing one out of a multitude of official duties upon the other, has led me to extend this discussion beyond bounds which would otherwise have been thought reasonable.

The language of the eminent jurist above mentioned is this:

"The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to

the strict, plain, common meaning of the words themselves; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

"The true interpretation, however, of every instrument being manifestly that which make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many instances use a peculiar language intelligible to those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known, peculiar,

idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases, evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the court or judge to construe the instrument, and to carry such real meaning into effect.

"But, whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such evidence would be either a dead letter or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to; it would be evidence which in most instances could not be met or countervailed by any of an opposite tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed. * * *

"Keeping in view these general observations, I would beg to state, in answer to the first question proposed by your lordships, viz., 'Whether the extrinsic evidence adduced in this cause, or what part of it is admissible for the purpose of determining who are entitled under the particular terms and descriptions contained in the deeds of 1704 and 1707, to the benefit of Lady Hewley's bounty', that I conceive, when a doubt has been once raised as to the meaning of these words—that is in the present case, as to the persons intended by Lady Hewley under the terms, 'Godly preachers of Christ's Holy Gospel', 'Godly persons,' and the other expressions, the court by which that doubt is to be decided, has a right

to inform itself, and is bound, if possible, to learn what was the acknowledged and received sense and meaning which those expressions bore at the time when Lady Hewley lived, and as near as may be at the time of the execution of those deeds, and for that purpose that all extrinsic evidence calculated to throw light upon the meaning of those words at that time is clearly admissible. Of that description are public records and documents throwing light upon the religious history of the times, the language of the statute book, and every enactment relating to the state and condition of the church and of the religious sects then known in England, contemporary history, contemporary treatises, &c. * * * But as the evidence which I have just described is evidence which is presumed to be in the mind of the judge or court, it is evidence which they furnish to themselves by reading, research, and reflection, not that which they receive from the mouth of witnesses, and on this account, I think all the extrinsic evidence which was actually given in the cause for the purpose of determining who were entitled under the terms 'Godly preachers of Christ's Holy Gospel,' and the other expressions used in the deeds was inadmissible. Such, for instance, as the evidence of Dr. Pye Smith and Dr. Bennett, as to the religious opinions of the Presbyterians and of other Protestant dissenters in the time of Lady Hewley, their interpretation of the terms used in the deeds, and their evidence of the religious opinions of Lady Hewley herself," &c. * * * (Shore *v.* Wilson, 5 Scott's New Reports, 958, 1,037 to 1,040, per Tindal, C. J.)

There is nothing to show that the claimant could not have cut at Big Meadows. Of the 800 cut in all by Leighton & Jordan, only about one-quarter had been cut when Mr. Peck's agent reached that spot (Record, 12, near bottom). At the time of making the contract, General Card did not know how much grass there was on Big Meadows, but he supposed there was a large quantity (Record, 20, finding XIII). The 800 tons cut by Leighton & Jordan did not exhaust it, nor had they

even run their mowing-machine around the whole of the meadow, though they had thus marked off "most *or* all" of it *that was fit for hay.* (Record, 12.) How much "most" would comprise; how much there was *unfit* for hay; whether or not General Card and the government are held to have guaranteed fitness and quantity, as well as location; and what, if any, title was obtained by running the mowing-machine around most of the fit grass; are questions that seem not to have been considered. The claimant's agent asserted no right to cut at that point, though saying he had expected to do so, nor did he ask to be permitted to also cut there. (Record, 21, finding XVI.) If he had, he could have, at least, cut the 150 tons which were ultimately taken of Leighton & Jordan, and transported from that point to the Tongue River cantonment.

II.

Nor can the claimant allege release from his obligation because his agent and men were refused an escort. (Record, 13, finding IV.)

The right to an escort was not absolute. The contractor was entitled to it only when "it may be deemed necessary by *the* post commander." (Record, art. VIII.) This evidently refers to the post commander mentioned in the preceding article—at Tongue River Station. It means that the contractor was to be protected while cutting at the station.

This officer was the sole arbiter of this question, and the contractor is bound by his decision.

The corresponding article in McKee's contract contained no such qualification, yet this court considered it doubtful if it were competent for the quartermaster to make such a stipulation, and that it literally

secured only the safety of the contractor's person (97 U. S., 235), and was extended further only by the construction actually put upon it by the accounting officers; which construction is excluded here by express proviso, excluding all claim for damages by Indian depredations, if no sufficient guard is furnished. (Record, 2, art. VIII.)

This article, in any event, could only secure protection while actually engaged in cutting, making, and transporting the hay. It could not be demanded while *en route* to look up grass from which to make the hay. That would no more come within the terms of the article than to claim an escort from Saint Paul, Sioux City, or other starting point of the train to Fort Buford.

It was not in fact needed. Though the claimant's agent asked for an escort, yet he afterwards went without one, searching throughout the valley of the Yellowstone and the Tongue River country, and returned because he could find no grass, and not because of Indians. (Record. 13.)

It was the 12th of October when he returned to Fort Buford (*Ib.*); obviously too late to do much haying in the northern clime (about 47° north latitude), and assuredly too late to transport the hay upon streams depending mainly for their water-supply upon the melting snows of the mountains. He traversed the country for forty miles about Tongue River (*Ib.*); hence he must have desired an escort only for some more distant expedition in search of that which the claimant had agreed to furnish.

The sole effect of this vain attempt to find and cut grass was to delay the shipment of that cut by Jordan & Leighton, and thus prevent its being transported cheaply by water.

No. 789. PECK *v.* UNITED STATES.

I.

If we are right in confining the party to the written contract, then there is nothing due for the wood; the $40,980.63, which it cost to transport the 150 tons of hay that was taken from the vicinity of Fort Buford to Tongue River, being properly deducted.

The contract was an entire one for supplies; expressly so declared as to this right of deduction. (Record, 2, top; art. IV.)

The wood was evidently to be the most profitable part of the contract. It was to be, could be, and was cut in the vicinage of the cantonment where it was to be consumed. This right was expressly stipulated for in art. VII of the contract. (Record, 2.)

The fact that the *place for cutting of the wood was specially designated, while that of procuring the hay was not, is additional intrinsic evidence that the latter article was to be procured wherever the contractor could best obtain it.*

Thus there was almost no risk about the wood, and very great (much greater than Mr. Peck realized), about the hay.

It is a common occurrence for contractors to bid low on one article, of which it is anticipated that less than the maximum named may be ultimately called for, and high upon that more certain to be fully required. In

fact, only less than one-fifth the amount of hay called for had finally to be transported to Tongue River cantonment.

The foregoing portion of this division of my argument was written before noting the accidental omission of the words "hay and wood" from Art. VII of the copy of the contract referred to by the court. I will let it stand. The insertion of those words show that Mr. Peck thought the right to cut both there equally valuable.

At all events, the maxim *Expressio unius*, &c., applies. The fact of an express written reservation of the right to cut at one point negatives the idea that there was a paramount and much more valuable reservation of the same right at an entirely different point, resting entirely in parol.

It excludes the idea of one definite, specific place of cutting as the subject-matter of the contract. At any rate, it left it open for Mr. Peck to cut either at Big Meadows or at the station, even if he had not the right to cut anywhere he could find suitable grass. But *until his agent had reached the station he could not tell whether he would find grass there or not.* Accordingly he pushed on to that point. What he really wanted was to have the Big Meadows reserved for him till he could ascertain whether or not the hay could be made nearer to Tongue River. It explodes the theory that the contract was really for labor, &c., in cutting grass instead of for hay.

II.

The claimant cannot recover for having cut the wood outside the limits originally designated by the contract.

He appears to put in, at the same time, claim for executing the contract, and for not being permitted to exe- it. If (as he asserts) the hay stipulated for had been secured by others, and he was not allowed to cut the wood where he was promised the right, he might have come home and brought suit for the breach of contract. Instead of that, he chooses to go on and execute it as required.

Nobody undertook to compel him to cut the wood where he did; only by general order to prohibit anybody from cutting where he originally proposed to cut. He had his election, to fill the contract outside the designated lines, or to claim damages for not being allowed to fulfil it; and he elected to pursue the former course.

This contract, signed by General Card, required and received the approval of General Terry and of General Sheridan to make it effective. All this precaution is futile, if the action of some subordinate officer, at a petty post, is to be considered as making a new contract, without advertisement or writing. Of course, anybody who has the physical force at command may prevent a man from carrying out his contract; but nobody can make one for the United States unless clothed with lawful authority for that purpose. (Hawkins *v.* United States, 96 U. S., 689.) The sooner contractors and officers are given to understand that one dressed in a little brief authority, for a specific purpose, and that only, cannot assume all the functions of every department of the government, and set aside the orders and agreements lawfully dictated and entered into by their superiors, the better it will be for all concerned. If contractors would exercise their legal right to refuse to perform aught except the very agreement they had entered into with

competent authority, there would be little or no interference by those having no right to interfere with its execution.

To hold the government as upon a contract for the unauthorized acts and interference of subordinates, would not only nullify all the statutory provisions above mentioned, but that probibiting the making of contracts in excess of appropriations, which is sought to be guarded against by article IX of the present contract. (Record, 2.)

Here the contractor complied with the order of the post-commander, as to the *place* of cutting the wood. Yet it was cut and delivered under the contract, and only by virtue of the contract, which regulates the price. He did so without the least intimation of any extra compensation, even if these persons had been competent to stipulate for it—which they were not. It is a wrong toward the United States for the contractor to acquiesce in the suggestion of some incompetent person that he shall do more work or furnish a better article than the proper authority chose to require. (96 U. S., 689; Dart *v.* Hercules, 57 Ill., 446, 450; Zottman *v.* San Francisco, 20 California, 96.)

No contract can be *implied* from the language or conduct of those incapable of making an *express* one. (Simpson *v.* Bowden, 33 Maine, 552, top; Ladd *v.* Franklin, 37 Conn., 62; Mayor *v.* Eshbach, 18 Md., 276.)

Here there can be no resort to implication, as the express promise was not abandoned, but is asserted in and is the sole ground of the petition and claim. (96 U. S., 697; citing Selway *v.* Fogg, 5 Mees. & Wel., 83, and many other cases.)

Though there must almost necessarily be some difference of detail, phraseology and circumstances between the contracts and cases, yet the *principle* of the case of Frances *v.* United States, 96 U. S., 354, must rule this, as held by the Court of Claims.

III.

The foregoing remarks equally apply to the designation of a certain quantity of *dry* wood to be delivered under the contract, instead of leaving it optional with the contractor to deliver dry or green. I do not believe extraneous evidence should be received to show that dry was intended; although, perhaps, it might be argued that the general term "wood" was ambiguous, as applicable to either condition of the article; but it has been executed, the claimant acquiescing in the interpretation put upon it.

The wood was by the contract subject to inspection. (Record, 1, bottom; art. III.) Perhaps the inspector might refuse to pass it because unfit for use on account of the water therein, as well as because of its being rotten; but he was not called upon to apply any such test.

IV.

It is useless to follow up every item of the claim which rests upon the alleged impropriety of the order to cut dry wood, and to cut no wood within a prescribed di s tance from the post. They are all answered in one way As to erection of huts, and the keeping of men, &c., &c.; these were all incident to the execution of the contract; and if, as we maintain, Mr. Peck can only claim *under* the contract which he executed, these items cannot be taken into account.

V.

As to the Beater press and other hay-press, mentioned in findings VI, IX, and XVIII (Record, 14, 15, 18, and 23, top); the pay for these is not claimed under the written contract. Their value was allowed in face of the fact that the proposal to buy them was by one who had no authority, and who coupled the proposition with the condition that he should procure authority, which (when asked for) was refused. (See above findings.) *A sale is found where, though the owner proposed to sell, the other party refused to buy!* The claimant refused to let the machines; nor does it appear that the quartermaster had authority to hire; yet there is no objection to paying for their use. The quartermaster could not bind the United States by an agreement to shelter private property. What is meant by the statement "It does not appear that said machines were ever returned to the claimant" (Record, 15; last sentence of finding VI,) I do not exactly understand. He carried them to Fort Buford; voluntarily left them there; he refused to let them; the government refused to buy; so far as is shown, he never sent for them, nor desired them, but demanded their value instead; therefore, I am at a loss what steps to return them it is supposed the government ought to have taken. Should the United States have carried it back to Keokuk for him?

An *implied* promise to buy is *inferred* where the party sought to be charged *expressly* refused to purchase.

But the item is not worth discussing.

The vital question in the case is the *legal* proposition about the admission of extrinsic evidence. This affects myriads of cases and nisi prius trials all over the land.

EDWIN B. SMITH,
Assistant Attorney-General.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

No. 788. UNITED STATES *v.* CAMPBELL K. PECK.

No. 789. CAMPBELL K. PECK *v.* UNITED STATES.

CROSS-APPEALS FROM THE COURT OF CLAIMS.

To avoid resort to certiorari, or a request for an additional finding in the above-entitled case, it is stipulated and agreed by counsel that in the duly certified copy of the contract furnished from the Quartermaster's Office of the War Department, upon the claimant's call and used in the cause as the evidence of said contract, in Art. VII (found at the middle of page 2 of the record,) second line, the words "hay and wood" were inserted *in writing* between the words "of the second party to cut" and the words "for the purpose of executing this agreement;" and in construing the contract, and considering this case, it should be determined as if it read in the record as above indicated.

EDWIN B. SMITH,
Assistant Attorney-General, for United States.

JOHN B. SANBORN,
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